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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 197

ESTABAN ADAM, PETITIONER,

vs.

WILLIAM SAENGER ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JULY 6, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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WILLIAM SAENGER ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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IN DISTRICT COURT OF JEFFERSON COUNTY, TEXAS, 60TH JUDICIAL DISTRICT

No. 45663

ESTEBAN ADAM

vs.

WILLIAM SAENGER et al.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—Filed November 22, 1935

To the Hon. R. L. Murray, Judge of said Court:

Esteban Adam, a citizen and resident of Los Angeles County, State of California, plaintiff, with leave of court obtained, files this his first amended original petition in lieu of his original petition herein, and complaining of William Saenger, P. P. Butler, H. A. Perlstein, Clarence A. Miller, John F. Pipkin, Morris M. Mothner, as heir and representative of R. M. Mothner, deceased, Mrs. Jenet Smith, W. O. Hoffmeyer, Mrs. Fannie W. Pogue, A. A. Perez, R. W. Deshon, Wm. Wahrmund, Mrs. B. R. Norvell, A. M. Kaufman, A. M. Kaufman, trustee, John Dollinger, Jr., Mrs. Lucy May Sanders, Ray Hoopes, W. H. Garretson, C. A. Lord, D. A. Pruter and H. A. Sanders, all of said defendants being residents of Jefferson County, Texas, for cause of action respectfully alleges and shows unto the court;

1.

On the 24th day of May, 1933, in that certain suit and cause of action styled and numbered Beaumont Export & Import Company, a Texas Corporation, plaintiff and cross-defendant, vs. Rodolfo Montes, defendant and cross-complainant, No. 279850 in the Superior court of the State of California in and for the County of Los Angeles, Rodolfo Montes, as defendant and cross-complainant, recovered final judgment in his cross action against the said Beaumont Export & Import Company for the sum of Five Thousand Dollars ($5,000.00) and all costs of court, which said costs amounted to the sum of Four Dollars ($4.00), which said

[fol. 13] principal sum of said judgment bears, under the laws of California, interest at the rate of seven per cent per annum from the date of said judgment. Thereafter the said Beaumont Export & Import Company by and through its duly authorized attorneys of record filed a motion to set aside the said judgment, which said motion was regularly heard by the court that had entered the said judgment and the said application was by said court in due course denied and no appeal therefrom having been taken or perfected within the time required by the laws of California, the said judgment thereby became final and is still a valid and subsisting judgment and no part thereof has been paid, though repeated demands for payment have been duly made. Thereafter, to-wit, on January 31, 1935, in due course of procedure under and in accordance with the laws of California and upon the ex parte motion of the said Rodolfo Montes, praying that said court dismiss the complaint of the said Beaumont Export & Import Company, and said court being fully apprised of the premises and it appearing to the court that there had been an inexcusable delay of more than five years after the filing of defendant's answer in prosecuring the said action, said court ordered, adjudged and decreed that the complaint in the above entitled action be and the same was dismissed and that the defendant, Rodolfo Montes, have and recover from the said plaintiff his costs and disbursements amounting to the sum of $4.00.

2.

The said judgment and every part thereof decreed and entered in the above entitled and numbered cause, to-wit, Beaumont Export & Import Company, a Texas Corporation, plaintiff and cross-defendant, vs. Rodolfo Montes, defendant and cross-complainant, No. 279850, was decreed and entered by a duly constituted superior Court of the State of California having general jurisdiction and after having acquired and having jurisdiction both of the subject matter and of the corporation and person constituting [fol. 14] the parties to said suit, in that, the said Beaumont Export & Import Company, a Texas Corporation, filed its said suit against Rodolfo Montes, then a resident or a citizen of the County of Los Angeles, State of California, and thereby voluntarily submitted itself and its alleged cause of action to the jurisdiction and authority of said

court; and thereupon Rodolfo Montes duly answered to said suit and subsequently filed his cross action or complaint against the said Beaumont Export & Import Company and obtained due, legal and actual service, in his said cross-complaint, on the said Beaumont Export & Import Company by making personal service on its duly authorized attorneys of record in said cause of a true copy of the said cross-complaint, which said service started or set in motion the running of the time within which the said corporation was required to answer, as expressly provided by the laws and procedure of the State of California; which said laws and procedure provided that a default judgment may be entered for failure to answer and plead to such cross-omplaint upon the service aforesaid. Wherefore, the said court of California, as a basis for and as a condition precedent to rendering the judgment aforesaid, had thus acquired actual and personal service of notice within its jurisdiction upon the said Beaumont Export & Import Company while said company and its duly authorized attorney of record were both within the territorial jurisdiction of said court.

3

The time provided and fixed by the laws of California for taking and perfecting an appeal from the said judgment and all parts thereof has long since expired and no appeal therefrom has ever been taken or perfected and no such appeal is now pending, either as to the judgment obtained on said cross action or as to the judgment of dismissal of plaintiff's cause of action. Wherefore, the said judgment in favor of Rodolfo Montes on his cross action [fol. 15] or cross-complaint against the Beaumont Export & Import Company was and is within itself a final judgment under the statutes and decisions of the State of California applicable thereto, regardless of the further judgment of the court entered on January 31, 1935, dismissing the cause of action filed by the Beaumont Export & Import Company for want of prosecution, such action of the court having been taken after the period of three years subsequent to the dissolution date of said corporation, and such three year period having expired on the 15th day of September, 1933, upon and after which latter date the said plaintiff corporation could not, under the laws and

decisions of the State of Texas, sue or be sued or perform any other legal act whatsoever, and its said suit and cause of action was thereby ipso facto dismissed and ceased to exist on and after the said 15th day of September, 1933, without the aid of the court's judgment of dismissal as aforesaid, wherefore, the said judgment in favor of Rodolfo Montes on his said cross action or complaint of itself alone, or, in the alternative, in connection with the judgment of dismissal by the court, and for the further fact that on and after the 15th day of September, 1933, plaintiff's cause of action was, as a matter of law, dismissed as aforesaid, constitutes a final judgment therein and same is now a valid and subsisting judgment under the laws of the State of California.

4

Under the applicable statutory provisions and the decisions of the courts of last resort of the State of California, a cross action or cross complaint is regarded, deemed and construed as another suit separate and distinct from the main action in which it is filed and a judgment thereon is a final and not interlocutory judgment regardless of whether or not the main or plaintiff's cause of action has been adjudicated; and execution thereon may be legally issued even though no final judgment or other disposition [fol. 16] has been made in plaintiff's cause of action; and such is the holding in Ritter vs. Braash, 11 Cal. App. 258, 442; 104 Pac. 592; Farar vs. Steenbergh, 173 Cal. Rep. 94; 159 Pac. 707.

5

That proper, legal and personal service was duly had upon the Beaumont Export & Import Company, plaintiff in the California suit, as aforesaid, is shown by the following record facts and circumstances, to-wit: after the said Montes, defendant in said suit, had duly filed his answer to said plaintiff's asserted cause of action and after amendments to their respective pleadings had been filed by both parties therein, the said Montes, on November 7, 1932, with express leave and order of the court first obtained, filed his cross-complaint therein, as shown by his pleading, a true copy of which is hereto attached and marked exhibit "A" and made a part of this petition. On November 9, 1932, due service was made upon the said

plaintiff by serving a true copy of the said cross-complaint and order of the court permitting the filing thereof upon plaintiff's then attorney of record, Richard F. Bailey; the said Bailey being the surviving member of the law firm of Patterson, Bailey & Montgomery, the original attorneys of record for the plaintiff, and the said Bailey then and there being the attorney of record in said cause for the said Beaumont Export & Import Company; the said service being shown by "an affidavit of service" by W. M. Eggeman, a true copy of which is hereto attached, marked Exhibit B and made a part of this petition. No answer having been filed to the said cross action, the attorneys for the said Montes filed of record notice that on the 20th day of April, 1933, at the hour of ten A. M., or as soon thereafter as counsel can be heard, in department 43 of said court, that cross-complainant, Montes, would move the court for an order to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the said cross-complaint, and thereupon duly served upon the said Richard F. Bailey a true copy of such notice and the said Bailey acknowledged receipt of such copy by signing the original, as shown of record by the said notice and acknowledgment of receipt, a true copy [fol. 17] of which is hereto attached, marked Exhibit C and made a part of this petition. The said Bailey failed to appear on the said 20th day of April, 1933, and thereupon counsel of record for said Montes phoned him and reminded him of the fact that the hearing on said motion had been set for said date, and thereupon said Bailey asked the court to continue the hearing until the 4th day of May, 1933, and at his request such order was entered; and that thereafter on the 4th day of May, 1933, the said Bailey still not appearing in the matter, the attorneys for Montes called the said Bailey on the telephone and inquired if he was ready to proceed with the hearing and motion and the said Bailey thereupon stated that he was busy with other matters and that he had written to his client, the Beaumont Export & Import Company, and desired a postponement of the hearing on the motion until he received a reply from his client and that thereupon, at his request, it was agreed to let the hearing on the motion be continued and it was continued until May 17, 1933; and at the same time the attorneys for Montes wrote the said Bailey a let-

ter and esposited same in the mail in the regular course, stating that in pursuance of the above mentioned conversation they had continued the hearing until May 17, 1933, at ten A. M., in department 43 of said court, in which letter he requested the said Bailey, "If you hear from your company, I will be pleased to have you communicate with me relative to this motion"; thereafter the attorney for Montes not having heard anything further from the said Bailey, proceeded with the hearing of the motion at the time and place set, as aforesaid, and on May 24, 1933, judgment in favor of the said Montes against the Beaumont Export & Import Company on said cross action was duly rendered and entered by the court, a true copy of which is hereto attached, marked Exhibit D and made a part of [fol. 18] this petition. On the 31st day of January, 1935, upon motion of the said Montes, and it appearing to the court that there had been an inexcusable delay of more than five years after the filing of defendant's answer in prosecuting the said action, it was ordered, adjudged and decreed by the court that "the complaint in the above entitled action be and the same is hereby dismissed, and that the defendant have and recover from the plaintiff herein his costs and disbursements incurred in this action, amounting to the sum of Four Dollars ($4.00)," as shown by a true copy of said judgment, which is hereto attached, marked Exhibit E and made a part of this petition.

6.

On the 6th day of September, 1933, notice was duly served upon the said Richard F. Bailey that judgment theretofore rendered in favor of the cross-complainant and against the plaintiff and cross-defendant had been entered by the clerk of said court on the 31st day of May, 1933, in Book 867 at page 262 of judgments in the office of the clerk of said court; this being shown by a true copy of said notice and acknowledgment of receipt thereof by the said Bailey, hereto attachec, marked Exhibit F and made a part of this petition. On November 15, 1933, said Richard F. Bailey duly served notice upon the attorneys of record for Montes, to-wit, Pelton, Warne & Balter, that on the 23rd day of November, 1933, at ten o'clock A. M., on said date, or as soon thereafter as said matter could be heard in the courtroom of department 43, the Beaumont

Export & Import Company, a Texas corporation, would move said court for its order setting aside the default entered on the 24th day of May, 1933, and permitting plaintiff and cross-defendant to file its answer served therewith; also stating that the said judgment was entered against the plaintiff and cross-defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff and cross-defendant's counsel and that said motion would be based [fol. 19] upon the affidavits of Richard F. Bailey, Lucile Holder and Adolph Levy, filed therewith, and upon the answer duly verified of plaintiff and cross-defendant, each and all of which said documents were attached thereto, etc., as shown by a true copy of said "notice and motion to set aside default" attached hereto and marked Exhibit G; and also true copies of affidavits as follows: Copy of the affidavit of Richard F. Bailey, marked Exhibit H; copy of affidavit of Adolph H. Levy, marked Exhibit I, and copy of the affiadvit of Lucille Holder, marked Exhibit J; all of which are attached hereto and made a part of this petition. At the same time the said Beaumont Export & Import Company, through its said attorney of record, Richard F. Bailey, filed its answer, duly verified, to said cross-action, a true copy of which said answer and verification is hereto attached, marked Exhibit K and made a part of this petition.

7.

In reply to the motion aforesaid to set aside the said judgment and to the evidence and affidavits submitted in support thereof, as shown in the next preceding paragraph, the said Montes, through his attorneys of record, filed affidavits of the following witnesses: Affidavit of W. M. Eggeman, copy of which is hereto attached, marked Exhibit L; affidavit of Clore Warne, a true copy of which is hereto attached, marked Exhibit M and made a part of this petition. Thereupon, in reply to said affidavits filed on behalf of the said Montes, the Beaumont Export & Import Company filed a counter-affidavit by Richard F. Bailey, a true copy of which is hereto attached, marked Exhibit N and made a part of this petition, and in reply to the said counter-affidavit of Richard F. Bailey, Clore Warne, one of the attorneys for Montes, made and filed an affidavit in said cause, a true copy of which is hereto attached, marked [fol. 20] Exhibit O and made a part of this petition.

8.

The statutes of the State of California, in force at all times herein mentioned and still in full force and effect, as applicable to service and proper procedure in cross actions and other actions pending in the courts of said state are of the tenor following:

"Notices and papers, when and how served. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

"1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; * * * (Code of Civil Procedure, Section 1011.)

The decisions of the courts of last result of the State of California in construing the aforesaid statutory provisions, hold that proper legal service may be made of a cross action on the adverse party by serving his attorney of record in the manner stated, to-wit, by making service of the papers or instruments either by delivering same personally to such attorney of record, or, in the alternative, if it is made during the attorney's absence from his office, by leaving the notice or other papers with his clerk therein or with the person having charge thereof; or, when there is no person in the office, legal service may be made by leaving the notice or other papers between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office of such attorney of record; and the said decisions of [fol. 21] California further hold that service on the attorneys for the plaintiff of a copy of the cross-complaint starts the running of the time within which they are required to answer and that a default may be entered for failure to answer or plead to such cross-complaint; and the following California cases so hold: Ritter vs. Braash, 11 Cal. App. 258; Estate of Nelson, 60 Pac. 772; Rose vs. Mesmer, 66 Pac. 594; Wood vs. Johnston, 96 Pac. 508; Farar vs. Steenbergh, 159 Pac. 707, 173 Cal. Rep. 94.

The said service was made in the instant cause, on the cross action filed by the said Montes in the said California Court, on the attorneys of record for Beaumont Export &

Import Company while the cause of action filed by the said Texas Corporation was still pending therein and before the expiration of the three year period following the dissolution of said Texas Corporation, though at the time said cross action was filed and the service thereon made the said corporation had been legally dissolved.

9

The three year period following the dissolution of the said Beaumont Export & Import Company terminated September 15, 1933, (the judgment on the cross action having been theretofore rendered) but on the 15th day of November, 1933, after the said three year period had terminated and at a time when the said corporation was legally and completely dead and without any legal powers under the statutes and decisions of the State of Texas, under whose laws it was created and dissolved, the said statutory trustees of said dissolved corporation, as hereinafter named, continued to prosecute its original cause of action against Montes, or permitted the said suit to remain on the docket of said court, and also continued to defend the said cross action by filing a motion in the name of the said Beaumont Export & Import Company to set aside the said Judgment on the cross-action and in support thereof filed, through their attorneys of record, the said Richard F. Bailey, purporting to act as attorney of record for the said Beaumont [fol. 22] Export & Import Company, the various affidavits above described, and thereupon put in issue and litigated before said court all of the issues of fact relating to whether or not proper legal service, under the laws, procedure and decisions of California, had been obtained in the said cross action, such as (a) whether said Bailey, as attorney of record for the Beaumont Export & Import Company and for the statutory trustees thereof, had been properly served, under the California laws, with copy of said cross action, (b) whether or not the said Bailey, in his capacity aforesaid, had been served with notice of the motion filed by Montes and his attorneys to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the said cross-complaint, and whether or not the said Bailey's signature acknowledging the receipt of a copy of the said notice or motion on the 15th day of April, 1933, was his bona fide signature, and as to whether

or not he had actually signed the original of said motion and received a copy thereof, (c) whether or not the hearing on said motion to enter the said judgment by default was continued or postponed on two different occasions at the request of the said Bailey, in his capacity as aforesaid, and (d) all other fact issues relating to proper service that could or should have been put in issue, litigated and determined by the court in passing upon and rendering its final order in granting or refusing the cross-defendant's motion to set aside the default judgment, and the court found and determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service, under the laws and decisions of California, in favor of the said Montes and against the said Beaumont Export & Import Company and its said statutory trustees, who litigated the said issues in the name of the then defunct Beaumont Export & Import Company; wherefore, all of the said issues of fact relating to service thereupon became and now are [fol. 23] res judicata as among the parties, to-wit: Montes and his privies and successors in interest on the one hand, and on the other, the Beaumont Export & Import Company and its statutory trustees hereinafter named, all of whom are thereby estopped to assert or to maintain anything to the contrary; all of this being shown by the action of the court in overruling their said motion to set aside the judgment on the cross action, a true copy of which said motion is hereto attached, marked Exhibit P and made a part of this petition.

10

Every and all of the aforementioned instruments of record on file in the said cause in the California court have been duly exemplified in strict compliance with the laws of the United States applicable thereto, as shown by a true copy of said exemplification hereto attached and marked Exhibit R, containing and expressly mentioning all of said instruments, except only the final order of the court overruling cross-defendant's motion to set aside the said default judgment, which is also exemplified in the same manner but under separate cover, and also the docket entries in said cause, exemplified in the same manner, but under separate cover, marked Exhibit Q and made a part hereof.

11

The said statutory trustees of the Beaumont Export & Import Company, hereinafter named, are further estopped to allege, contend or to maintain that the said service had on the said cross action upon Beaumont Export & Import Company was improper or inadequate in any manner whatsoever, because they knew that the said corporation had been dissolved on the 15th day of September, 1930, while they were officers and directors thereof, and had themselves, in connection with the other stockholders, caused and brought about its said dissolution, and having such actual knowledge, they fraudulently continued to prosecute said original suit against the said Montes, or to permit same to remain on the docket and to defend the said cross action [fol. 24] of Montes against the said corporation in the name of the corporation, and designedly, fraudulently or negligently concealed from the court and from the said Montes and his attorneys, and carelessly and fraudulently failed to make known to them, the fact that the said corporation had been dissolved; wherefore, they should not now be heard to complain of any alleged inadequacy of service upon the said cross action, for that, in all of said acts the said statutory trustees were the real parties in said suit and prosecuted and defended as aforesaid in the name of the said corporation merely as a convenience for themselves and for their own benefit, or for the joint benefit of the said statutory trustees and the other stockholders of said corporation.

12

The said statutory trustees of the Beaumont Export & Import Company, in voluntarily entering their appearance in the said California court for the purpose of having the said judgment on the cross action set aside, and in filing their answer to said cross action, all of which was fraudulently done, as aforesaid, in the name of the Beaumont Export & Import Company as a corporation, after its existence and powers were wholly lost and had ceased to exist for any purpose whatsoever, thereby made their own personal appearance in said court for the purposes aforesaid, by and through the said Richard F. Bailey, who was in fact, under the circumstances, their own attorney of record and retained by them and authorized to represent them in said matters, and their said personal appearance therein was for all purposes

and not in anywise limited to the specific purpose of making known to the court their contention that the necessary or proper service upon the cross action had not been had as a basis for the rendition of a valid judgment under the statutes and decisions of the State of California; and thereby they [fol. 25] submitted themselves personally to the jurisdiction of said court for all purposes and they are estopped to claim or assert anything to the contrary. During all of said times neither the said California court, nor the said Montes, nor the said attorneys of record for the said Montes, had any knowledge, either actual or constructive that the said Beaumont Export & Import Company had been dissolved; the said dissolution having taken place in the city of Austin, State of Texas, and that fact not having been called to the attention of any of said persons by the said statutory trustees, or by the attorneys of record either for said corporation or for said trustees.

13

By voluntarily entering their appearance in the said California court, by and through their duly authorized attorney of record, Richard F. Bailey, in moving the court to set aside the said default judgment and at the same time filing their answer to the cross action, the said statutory trustees of Beaumont Export & Import Company, both for the stockholders and creditors thereof, and in litigating the fact issues of service, as aforesaid, and in requesting and obtaining, through their said attorney of record, two continuances and postponements of the hearing of cross-plaintiff's motion to enter judgment by default (such facts necessarily by implication having been determined by the court in passing upon the motions aforesaid) the said statutory trustees for the stockholders and creditors of the Beaumont Export & Import Company and the said Beaumont Export & Import Company itself, during its legal life and while invested, under the laws of Texas, with the power and authority to sue and be sued, waived all defects, improprieties or illegalities, if any existed, with respect to the service on the said cross action and with respect to service on all subsequent motions and procedure relating thereto; and the said [fol. 26] Beaumont Export & Import Company, during its legal life, to-wit, up to the 15th day of September, 1933, and the said statutory trustees for the stockholders and creditors of the said corporation after its dissolution, are thereby

legally estopped to claim or to assert that proper and legal service, under the laws and decisions of the State of California, was not obtained on the said cross action.

14

The laws, jurisprudence and decisions of the courts of last resort of the States of Texas and of California are the same, or substantially so, as applicable to the facts and circumstances alleged in the preceding paragraphs relating to issues of estoppel and waiver aforesaid, and of the issue of res judicata as alleged.

15

On the 7th day of June, 1933, the said Rodolfo Montes being then the legal and equitable owner and holder of the said judgment, decreed and entered in his favor on his cross action or complaint as aforesaid, for valuable consideration received by him, sold, assigned and transferred all of his right, title and interest therein to Consuelo H. De Montes; and on the 16th day of September, 1933, the said Consuelo H. De Montes, being then and there both the legal and equitable owner and holder of said judgment and of all right, title and interest therein, for a valuable consideration received and acknowledged for her, sold, assigned, transferred, set over and conveyed unto the said Esteban Adam, the plaintiff herein, all of her said right, title and interest in and to the said judgment; and the said Esteban Adam as plaintiff in this cause is now the legal and equitable owner and holder of all right, title and interest in and to the said judgment.

16

At the time of the filing of said suit in the court of California as aforesaid and long prior thereto, the Beaumont Ex-[fol. 27] port & Import Company was a corporation duly and legally incorporated under the laws of the State of Texas with its principal office in Beaumont, Jefferson County, Texas; but sometime after it instituted said suit, and while such suit and cross action were still pending, the said corporation, by vote and consent of its then stockholders and in pursuance of the laws of the State of Texas, was legally dissolved on the 15th day of September, 1930, and a certificate of such dissolution duly issued by the Secretary of State of the State of Texas. No receiver has ever been appointed by any

court of competent jurisdiction, nor in any other manner, for the said dissolved Beaumont Export & Import Company.

17

At the time the said corporation was dissolved as aforesaid, William Saenger was its president and its directors were: William Saenger, P. P. Butler, W. H. Garretson, H. A. Perlstein and Charles H. Weinbaum; and the said president and directors thereupon became, were and still are trustees of the creditors and stockholders of the said Beaumont Export & Import Company and were, as such trustees, invested with all of the power and authority as expressly provided by the statutes, laws and decisions of the State of Texas; and the said president and directors of said dissolved corporation accepted the said trust as such trustees for the stockholders and creditors thereof and from the date of the said dissolution to the time of the filing of this suit they have, as plaintiff is informed, believes and so alleges, acted as such trustees and have had and exercised full charge, control and possession of the assets belonging to the said Beaumont Export & Import Company at the time of its dissolution, and have, from time to time, converted such assets into monies and have already distributed the said monies or [fol. 28] a large part thereof among the stockholders, who are now in possession and enjoyment thereof, without first having paid its said indebtedness to the said Rodolfo Montes, that is, his claim against the said corporation as represented in his cross action in the suit aforesaid and without having paid the judgment obtained by the said Rodolfo Montes as a result of said claim. Plaintiff is informed and believes and on such information and belief alleges that the said trustees have collected and converted into money the assets of said corporation in the total sum of approximately One Hundred Forty Two Thousand Five Hundred Dollars ($142,500.00) and that some of said monies have been distributed among the stockholders of the Beaumont Export & Import Company, and that as a result of such a large distribution of its assets among its stockholders, there is probably not, or may not be, enough money left in the possession of such trustees to pay plaintiff's said judgment, interest and costs of court; that said trustees were guilty of either actual or constructive fraud or of negligence in distributing the said assets among the stockholders

without first paying plaintiff's judgment; that on account of such actual or constructive fraud or negligence on the part of said trustees in distributing and paying out said monies to the stockholders, plaintiff is entitled and sues to recover judgment against the said trustees, both jointly and severally, and against each of them personally, for the amount of his said judgment, interest and court costs.

18

In the alternative, plaintiff is informed and believes and on such information and belief alleges that the said statutory trustees for the stockholders of the said dissolved Beaumont Export & Import Company, to-wit, William Saenger, P. B. Butler, W. H. Garretson, H. A. Perlstein and [fol. 29] Charles H. Weinbaum, have not distributed among the stockholders all of the monies, properties and proceeds from properties sold, such as belonged to the said corporation on the date of its dissolution, but that, on the contrary, they have large sums of such monies, properties or assets still on hand and undistributed and amply sufficient to pay the judgment upon which this suit is brought and all interest and costs that have accrued or may accrue both in the said California court and in this court and that plaintiff has a statutory and equitable lien on all of said monies, properties and assets to secure the payments thereof.

19

In the alternative, and if for any reason plaintiff be not entitled to recover judgment against the said trustees for the total amount of his claim as aforesaid, then and in such event he alleges and shows unto the court that he is legally and equitably entitled to recover judgment against every and all of the defendants herein such as were stockholders in the Beaumont Export & Import Company at the time of its dissolution to the extent of the monies received and converted by the said respective defendants and stockholders from the monies and assets owned by said company at the time of its dissolution, and that he has a legal and equitable lien against all of said assets owned by said corporation at the time of its dissolution to secure the payment of his claim and judgment. Plaintiff further alleges that the said defendants and stockholders owned shares of stock in said corporation at the time of its dissolution and have received

and converted their respective portions of the monies and assets of said company since its dissolution to the extent of approximately One Hundred Forty Two Thousand Five Hundred Dollars ($142,500.00) proportionately among them as follows:

[fol. 30]

Name of Stockholders	No. of Shares
William Saenger	967
P. P. Butler	460
H. A. Perlstein	208
Clarence A. Miller	2
John F. Pipkin	41
R. M. Mothner	41
Mrs. Janet Smith	5
W. O. Hoffmeyer	5
Mrs. Fannie W. Pogue	2
A. A. Perez	10
R. W. Deshon	55
Wm. Wahrmund	3
Mrs. B. R. Norvell	17
A. M. Kaufman	166
A. M. Kaufman, Trustee	20
John Dollinger, Jr.	62
Mrs. Lucy May Sanders	11
Ray Hoopes	13
W. H. Garretson	143
C. A. Lord	2
D. A. Pruter	52
H. A. Sanders	8

20

Premises considered, plaintiff is entitled to an accurate accounting on the part of the said trustees, and also on the part of all of the said stockholders, showing all of the asests, consisting of either monies or other property on hand and belonging to said Beaumont Export & Import Company from the date of its dissolution; a statement of all of the [fol. 31] properties that have been converted into cash and the amounts thereof; also of all the cash payments or conveyances of properties other than cash to the various stockholders since the dissolution of said corporation; and an accurate statement of all monies and other properties belonging to said corporation coming into the hands of the

said trustees in their capacity as such, or, in the alternative, into the hands and possession of every and all of said stockholders from the date of the dissolution of the corporation to the date of the accounting.

21

Under the statutes of the State of California and the applicable decisions of the courts of last resort of said State, a final judgment rendered by its courts of competent jurisdiction, ipso facto and even though the judgment does not so expressly provide therein, bears interest at the rate of seven per cent from the date of such judgment.

22

The said statutory provisions of the state of California with respect to service in cross actions of copies of pleadings and other instruments, as set out in paragraph 8 of this petition, were at all times herein mentioned applicable both to persons and corporations and were and are reasonable and inherently just, in that, they afforded an opportunity to defendants or adverse parties to be heard and to have "their day in court" and were not in anywise inconsistent with the general canon of jurisprudence requiring that a person or defendant must be offered a hearing before his rights can be affected by judicial action and are in substantial harmony with and in nowise antagonistic to the laws of Texas applicable to the same or like facts and subject matter.

[fol. 32]

23

Under the laws of California the said judgment was not barred by limitation nor was incapable of being otherwise enforced there at the time of the filing of this suit; and under the laws of California and Texas said judgment would not be barred by limitation until the expiration of a period of ten years after the date of the judgment.

24

The statutes of the State of California in force at the time the judgment on the cross action aforesaid was obtained provide, in connection with the statutory provisions

cited and quoted in paragraph 8 of this petition, the following:

Sec. 1015. Service where defendant resides out of State. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpœnas, of writs and other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place.

Section 442. Cross-complaint. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happen- [fol. 33] ing or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.

All of the aforementioned statutory provisions of California, to-wit, Sections 442, 1011 and 1015, and the decisions of the courts of last resort of California construing the said statutes, constitute and embrace the law of the instant case applicable to obtaining proper service and giving adequate notice to the opposite party in cross actions, all of which said statutory provisions were in force, valid and binding and applicable hereto at the time said cross

action was filed and at the time the judgment thereon, as aforesaid, was obtained and entered, for that, said original and cross actions related directly to the same contract, transaction, matter and property.

Wherefore, plaintiff prays as follows:

(a) That the said defendants and every and all of them be duly cited to answer this petition and that their names and present addresses are as follows:

William Saenger, Beaumont, Texas.
P. P. Butler, Beaumont, Texas.
H. A. Perlstein, Beaumont, Texas.
Clarence A. Miller, Jefferson County, Texas.
John F. Pipkin, Beaumont, Texas.
[fol. 34] Morris M. Mothner, heir and legal representative of R. M. Mothner, deceased, Beaumont, Texas.
Mrs. Jenet Smith, Jefferson County, Texas.
W. O. Hoffmeyer, Jefferson County, Texas.
Mrs. Fannie W. Pogue, Jefferson County, Texas.
A. A. Perez, Jefferson County, Texas.
R. W. Deshon, Jefferson County, Texas.
Wm. Wahrmund, Beaumont, Texas.
Mrs. B. R. Norvell, Beaumont, Texas.
A. M. Kaufman, Beaumont, Texas.
A. M. Kaufman, Trustee, Beaumont, Texas.
John Dollinger, Jr., Beaumont, Texas.
Mrs. Lucy May Sanders, Jefferson County, Texas.
Ray Hoopes, Beaumont, Texas.
W. H. Garretson, Beaumont, Texas.
C. A. Lord, Beaumont, Texas.
D. A. Pruter, Jefferson County, Texas.
H. A. Sanders, Jefferson County, Texas.

(b) That the said defendants be required to render into court an accurate accounting of all the properties consisting of money and other assets belonging to the said corporation at the date of its dissolution and down to the present time or down to the date of the said accounting, showing an accurate disposition of all of said monies and properties, to what persons the said properties have been paid or conveyed, and showing also every and all of the amounts paid to and received by every and all of said defendants as stockholders in said corporation;

(c) Plaintiff further prays that the said judgment, described in the foregoing petition, rendered and decreed by the said superior court of the state of California be declared and established by this Honorable court to be a valid and binding obligation, originally against the said [fol. 35] Beaumont Export & Import Company, a corporation, and that the said judgment be declared and established by this court, under the "full faith and credit clause" of the constitution of the United States, as a judgment in favor of plaintiff against the said statutory "trustees" of the creditors and stockholders of the said Beaumont Export & Import Company, and against the said trustees, jointly and severally, in their capacity as such; and that the said judgment be declared and established in favor of the plaintiff against the said statutory trustees, both in their capacity as such trustees and against every and all of them personally because of their actual or constructive fraud or negligence in paying out and permitting to be distributed the said monies, properties and funds of the said corporation to and among the said stockholders, instead of first paying the judgment herein sued on and other debts of the said corporation;

(d) Plaintiff further prays judgment against every and all of the aforementioned defendants, such as were stockholders in said corporation and owners af shares thereof at the time of its dissolution and those that have purchased or acquired such shares of stock since its dissolution and have participated in the distribution of the assets of said corporation, and prays that such judgment be entered against every and all of such defendants, jointly, severally and personally; and, in the alternative, plaintiff prays that judgment be rendered against every and all of such defendants and stockholders in the proportion and to the extent that they have received monies and appropriated to their own use and benefit monies, funds and properties of said Beaumont Export & Import Company; and, still in the alternative, plaintiff prays for such judgment herein against the said trustees or against said trustees and the other defendants as stockholders and against any and all of said defendants herein as he may show himself entitled to have, under the pleadings and the evidence;

[fol. 36] (e) Plaintiff further prays that said judgment rendered by said California court for the sum of Five Thou-

sand Dollars ($5,000.00) and costs of court be decreed and established by this court as a judgment for said amount of Five Thousand Dollars ($5,000.00) with interest thereon at seven per cent per annum from the date thereof, as aforesaid, such being the legal rate of interest all judgments bear under the statutes and laws of the State of California, together with all costs of court that have accrued and were incurred in the California court, to-wit, the sum of Four dollars ($4.00) and also all costs of this court;

(f) That the court decree and fix a lien in favor of plaintiff against all of said properties of the said Beaumont Export & Import Company owned at the time of its dissolution, to secure the payment of plaintiff's claim or judgment that may be rendered in his favor; and for judgment foreclosing said lien;

(g) Plaintiff further prays for all such further relief, both general and special, to which he may be entitled in law or in equity.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Plaintiff.

EXHIBIT "A" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES

Cross Complaint

Now comes Rodolfo Montes, by leave of court first had [fol. 37] and obtained, and files this, his cross-complaint against the plaintiff and cross defendant, and alleges as follows:

I

That the cross-defendant is now, and was at all times hereinafter mentioned, duly organized and existing under the laws of the State of Texas.

II

That heretofore, and on or about the 20th day of June, 1927, cross-complainant was the owner and lawfully possessed of certain goods and chattels of the value of Five Thousand Dollars ($5,000.00), which said goods and chattels are more particularly described as follows:

Item:

(1) 1 Section 31' Special Vermont Back Bar with 6' Cabinet to match refrigerated chamber.
(2) 1 Section 6' Rhode Island Special back bar refrigerated.
(3) 1 Section 31' #63 Cabinet base.
(4) 1 Section 6' Refrigerated base.
(5) 1 Section 37' all white Vitrolite & Mahog. Counter 31' of same for saloon bar and 6' of same for soda fountain.
(6) 2 8'-4" Nickel silver drain board section with shelf extensions in rear as shown on blue print.
(7) 1 Model #206-6' No. 1 Style Soda Fountain Interior with no waste icing system.
(8) 1 8' Rhode Island Luncheonette for steam with 4 jars.
(9) 1 8' Vitrolite Refrigerated counter.
(10) 1 Standard Soda Carbonator.

II

That on or about said day, the cross-defendant unlawfully took and carried away said goods, and converted and disposed of the same to his own use, to the damage of the cross-complainant in the sum of Five Thousand Dollars ($5,000.00).

[fol. 38] Second Cause of Action

For a second, separate and distinct cause of action, cross-complainant adopts paragraphs I and II, as hereinbefore set forth and alleges:

III

That on or about the said 20th day of June, 1927, cross-complainant delivered to cross-defendant the said personal property to be by said cross-defendant safely and securely kept for said cross-complainant, and to be returned and redelivered to the cross-complainant after an inspection

thereof by said cross-defendant, which said cross-defendant then and there promised and undertook to do.

IV

That said cross-defendant did not take due care of, and safely keep, the said personal property for cross-complainant, nor did it, after said inspection, or otherwise or at all, redeliver said personal property to the cross-complainant, but on the contrary cross-defendant so negligently and carelessly conducted itself with respect to the said personal property, and took so little care thereof that by and through the carelessness and negligence and improper conduct of the cross-defendant, its agents and servants, said personal property was wholly lost to the cross-complainant, to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore, cross-complainant demands judgment against cross-defendant in the sum of Five Thousand Dollars ($5,000.00), for costs and all proper relief.

Pelton & Warne, by Clore Warne, Attorneys for Defendant and Cross-Complainant.

[fol. 39] 806 Union Bank Building,
Los Angeles, California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Rodolfo Montes, being by me first duly sworn, deposes and says; That he is the defendant and cross-complainant in the aboveentitled action; that he had read the foregoing cross-complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Rodolfo Montes.

Subscribed and sworn to before me this 31 day of October 1932. Edith E. Mallory, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

Filed Nov. 7 P. M. 2:26 1932. L. E. Lampton, County Clerk, by W. L. Greene, Deputy.

EXHIBIT "B" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of Service of Cross-Complainant and Order Permitting Filing of Cross-Complaint

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. M. Eggeman being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action: I served the copy of cross-complaint and Order permitting filing of cross-complaint in this action by personally delivering to and leaving with the [fol. 40] following person at the County of Los Angeles on the date set opposite their respective names, a true copy thereof, to-wit:

Richard F. Bailey	Nov. 9, 1932.
by leaving with clerk in office	193-.
	193-.
	W. M. Eggman.

Subscribed and sworn to before me Nov. 10th, 1932.
Edith E. Mallory, Notary Public.

Filed Nov. 12 A. M. 10:28 1932. L. E. Lampton, County Clerk, by F. Zadian Deputy.

EXHIBIT "C" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Notice of Motion for Order to Enter Default and for Judgment Upon Cross-Complaint

To the plaintiff and cross-defendant, Beaumont Export and Import Company, a Texas Corporation, and to Messrs. Patterson, Bailey & Montgomery, and to Richard F. Bailey, surviving member of said firm, attorneys for said plaintiff and cross-defendant:

Please Take Notice, that the defendant and cross-complainant, Rodolfo Montes, will on the 20th day of April, 1933, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, in Department 43 of said court, move said court for an order to enter the default of the cross-defendant, Beaumont Export and Import Company, for failure to appear and answer or plead to the cross-complaint of defendant and cross-complainant, Rodolfo Montes, herein filed, and heretofore served upon counsel for said plaintiff and cross-defendant, and for an order that judgment may be entered against said plaintiff and cross-defendant as prayed in the said cross-complaint. Said motion will be made upon the ground that no appearance, or other pleading has been filed to said cross-complaint after due service on attorneys for cross-defendant. [fol. 41] Papers to be used upon said motion will be records, pleadings and files in said action, said cross-complaint and this notice of motion.

Dated this 14th day of April, 1933.

Pelton & Warne, by Clore Warne, Attorneys for Cross-Complainant, 806 Union Bank Building, Los Angeles, California.

Points and Authorities

Service on attorneys for plaintiff of copy of cross-complaint starts running of time for answer, and default may be entered for failure to answer or plead.

Ritter v. Braash, 11 Cal. A. 258; C. C. P. 442, 585.

Received copy of the within Notice of Motion this 15 day of April 1933. R. F. Bailey Attorney for Cross-Defendant.

Filed Apr. 15, 1933. A. M. 11:24. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

Exhibit "D" to Petition

In the Superior Court of the State of California in and for the County of Los Angeles

No. 279850

Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

Rodolfo Montes, Defendant and Cross-Complainant

Judgment

Certified Copy Issued: Sep. 18, 1933 (2). Jan. 3, 1934. Jan. 4, 1934. Jun. 22, K1935

[fol. 42] The cross-complainant and defendant, Rodolfo Montes, in the above entitled action having through his attorneys, Pelton & Warne, on the 4th day of May, 1933, before this Honorable Court, in Department 43 thereof, moved for an order to enter default against the said cross-defendant Beaumont Export and Import Company, and for a Judgment thereon, and notice required by law having been duly given to the said cross-defendant Beaumont Export and Import Company, and the court being fully advised in the premises and having examined the files.

It is Therefore Ordered Decreed and Adjudged

That Rodolfo Montes, cross-complainant, have and recover Judgment against the Beaumont Export and Import

Company, a Texas corporation, cross-defendant, for the sum of Five Thousand Dollars ($5,000.00) and costs in the sum of $—.

Dated May 24, 1933.

Douglas L. Edmonds, Judge.

Filed May 25, 1933. Typed by F. V. Merchant. Entered May 31, 1933. L. E. Lampson, County Clerk, by L. Washburn Deputy. (Book 867, Page 262.) Assignment to Consuelo H. De Montes, filed 6/8/1933. Assignment to Esteban Adam, filed Sep. 20, 1933. Attest 9/21/33.

[fol. 43] EXHIBIT "E" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Judgment of Dismissal

Certified Copy Issued Mar. 5, 1935

Upon the ex parte motion of the above named defendant, for the judgment of this court dismissing the complaint of the plaintiff in the above entitled action, the court being fully apprised of the premises, and it appearing to the court that there has been an unexcusable delay of more than five years after the filing of the defendant's answer in prosecuting the said action.

It is therefore Ordered, Adjudged and Decreed that the complaint in the above entitled action be and the same is hereby dismissed, and that the defendant have and recover from the plaintiff herein his costs and disbursements incurred in this action, amounting to the sum of $4.00.

Dated Jan. 31st, 1935.

Harry R. Archbald, Acting Presiding Judge.

Filed Jan. 31, 1935. Typed by E. E. Cohn. Entered Feb. 2, 1935. L. E. Lampton, County Clerk, by I. Bottomley Deputy. (Book 897, Page 313.)

[fol. 44] EXHIBIT "F" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Notice of Entry of Judgment

To the plaintiff and cross-defendant above named and to Messrs. Patterson, Bailey & Montgomery and Richard F. Bailey, Esq., its attorneys:

Please Take Notice that judgment heretofore rendered and made in favor of cross-complainant and against plaintiff and cross-defendant was entered by the clerk of said court on the 31st day of May, 1933, in Book 867, at page 262 of Judgments in the office of the clerk of said court.

Dated this 6th day of September, 1933.

Pelton & Warne, by Clore Warne, Attorneys for Defendant and Cross-Complainant.

Received copy of the within notice of Entry of Judgment this 8th day of September, 1933, A. M. 10:29. R. F. Bailey by Holder, Attorney for Plaintiff and Cross-Defendant.

Filed Sep. 8, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

EXHIBIT "G" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff,

vs.

RODOLFO MONTES, Defendant

Notice of Motion to Set Aside Default

[fol. 45] To Clore Warne and to Pelton, Warne and Balter, Attorneys for the aboved named defendant and cross-complainant:

You and each of you will please take notice that on the 23rd day of November, 1933, at 10 o'clock A. M. on said

date, or as soon thereafter as said matter can be heard in the courtroom of Department 43 of the above entitled court, 18th Floor of the city Hall, plaintiff and cross-defendant, Beaumont Export and Import Company, a Texas Corporation, will move said court for its order setting aside the default entered herein on the 24th day of May, 1933, and permitting plaintiff and cross-defendant to file its answer, served herewith.

Said motion will be made on the following grounds, to-wit: That said judgment was entered against said plaintiff and cross-defendant through the mistake, inadvertance, surprise or excusable neglect of plaintiff's and cross-defendant's counsel.

That said motion will be based upon this notice, the affidavits of Richard F. Bailey, Lucile Holder, and Adolph Levy, filed herewith, and upon the answer, duly verified, of plaintiff and cross-defendant, each and all of shich said documents are attached hereto, and upon all of the other pleadings, documents, records and files in the above entitled and numbered matter.

Dated, Los Angeles, California, this 15th day of November, 1933.

Richard F. Bailey, Attorney for Plaintiff and Cross-Defendant.

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, 1933, P. M. 4:19. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

[fol. 46] EXHIBIT "H" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff,

vs.

RODOLFO MONTES, Defendant

Affidavit on Motion to Set Aside Default Judgment on Cross-Complainant

STATE OF CALIFORNIA,
County of Los Angeles:

Richard F. Bailey, first being by me duly sworn, upon his oath deposes and says: That he is one of the attorneys

of record of plaintiff and cross-defendant in said above-numbered and entitled cause; that said action was filed originally in the early part of 1929; that an amended complaint was filed on July 18th, 1929; that an answer thereto was filed on August 22nd, 1929; that an amendment to the answer by said defendant and cross-complainant, setting up a plea in abatement, was filed on October 19th, 1929; that an order permitting the filing of a cross-complaint was entered on November 7th, 1932; that it appears from the record that an affidavit of service, sworn to by one, William Eggerman; that said cross-complaint was served on affiant "by leaving same with clerk in office" on November 9, 1932; that thereafter a notice of motion for order to enter default was served and said motion bears what purports to be affiant's signature; that said notice of motion purports to have been served April 15th, 1933; that in truth and in fact the signature upon said document is not affiant's signature and affiant did not authorize the signing [fol. 47] thereof and knew nothing about the signing thereof until an examination of said record on or about September 12th, 1933; that on said 8th day of September, 1933, notice of entry of judgment on said cross-complaint was served upon affiant by serving affiant's secretary and that said notice of entry of judgment was the first notice or knowledge of any kind that affiant had that said cross-complaint had been filed and/or said judgment by default thereon entered.

That affiant had no clerk on the 9th day of November, 1932, and affiant has questioned both affiant's secretary, to-wit Lucile Holder, and an attorney associated with affiant at said time, to-wit, Adolph Levy, and each of the said parties states that said cross-complainant was not served upon them or either of them; that said two parties were the only parties authorized by affiant to sign papers for affiant and neither of said parties signed said notice of motion to enter default, which purported to bear affiant's signature as of date April 15th, 1933.

That affiant knew nothing about the filing of said cross-complaint or the entry of judgment thereon or of any matters pertaining thereto until after the service of said notice of entry of judgment on or about September 8th, 1933. That since that time to date hereof, affiant has made diligent search of affiant's files and has talked with each and every person associated in the suite of offices with affiant

and none of said persons has any knowledge or notice of either the serving of said cross-complaint or of the motion to enter default purporting to bear affiant's signature; that the plaintiff and cross-defendant has a meritorious defense to said cross-complaint as appears from the proposed answer of said plaintiff and cross-defendant attached hereto and served contemporaneously herewith.

Richard F. Bailey.

[fol. 48] Subscribed and sworn to before me this 1st 17th day of November, 1933. N. Kelso, Notary Public in and for Said County and State. (Seal.)

EXHIBIT "I" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Plaintiff

Affidavit of Adolph H. Levy

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Adolph H. Levy, being by me duly sworn, upon his oath deposes and says:

That affiant is an attorney at law duly licensed to practice law in the State of California, and has been practicing in the city of Los Angeles for the last several years past; that for some time prior to November 9, 1932, and continuously thereafter until Subsequent to April 15, 1933, affiant was associated as an attorney with Richard F. Bailey in the practice of law with Richard F. Bailey, at 808 Quinby Building, Los Angeles, California; that to affiant's knowledge the said Richard F. Bailey had no other person associated with or employed by him either as an attorney or as a clerk during any of said period above mentioned; that affiant attended to all matters of a legal nature of the said

Richard F. Bailey during the said Richard F. Bailey's absence from the office; that affiant was not served with [fol. 49] and knew nothing about a certain "Notice of Motion for Order to Enter Default and for judgment upon cross-complaint" filed in said above numbered and entitled action, which was purportedly signed by Richard F. Bailey; that affiant had no notice or knowledge of any kind of an order permitting the filing of a cross-complaint purportedly served "by leaving with the clerk in the office" of the said Richard F. Bailey on November 9, 1932; that affiant has never seen and knew nothing about either of said documents at any time until the same was mentioned and brought to the attention of affiant by the said Richard F. Bailey, within the past two or three weeks.

Further affiant sayeth not.

Dated at Los Angeles, California, this 15th day of November, 1933.

Adolph H. Levy.

Subscribed and sworn to before me, this 15th day of November, 1933. Edna Taft, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

EXHIBIT "J" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Plaintiff

Affidavit of Lucille Holder

[fol. 50] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Lucille Holder, being be me first duly sworn, upon her oath deposes and says:

That she as Secretary of Richard F. Bailey for several years prior to April 1, 1933; that since leaving the employ

of Richard F. Bailey affiant has at times been employed by Robert M. Pease, associated in the same office suite with Richard F. Bailey.

That the said Richard F. Bailey has called to affiant's attention statement in the affidavit of one William Eggerman that the cross-complaint in said above entitled and numbered cause was served upon the said Richard F. Bailey "by leaving with clerk in office" on November 9, 1932; that affiant has no recollection of said cross-complaint having been left with her or served upon the said Richard F. Bailey at any time; that affiant has no recollection of whether or not the notice of motion for order to enter default was served upon Richard F. Bailey through her; that affiant has made a diligent search of all the files of the said Richard F. Bailey but has been unable to locate said two documents or either of them or a copy of said documents or any notation upon the records of said office as to the service of said documents or either of them.

Dated at Los Angeles, California, November 15, 1933.

Lucille Holder.

Subscribed and sworn to before me this 15th day of Nov. 1933. Edna Taft, Notary Public in and for said Co. and State. (Seal.)

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, P. M. 4:21, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

[fol. 51] EXHIBIT "K" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Answer to Cross-Complaint

Comes now the plaintiff and cross-defendant in the above entitled action and in answer to said cross-complaint admits, denies and alleges, as follows:

As to First Cause of Action:

I

Admits paragraph I.

II

Denies each and every allegation of said paragraph II of said cross-complaint and says that the same is not true in whole or in part and demands strict proof thereof; and plaintiff further alleges that such possession, if any it had, of certain items or either or any of them mentioned in said paragraph II was with the consent and approval of said cross-complainant and was not on said 20th day of June, 1927, or at any other time mentioned in said cross-complaint, or any date subsequent thereto, owned or possessed by said cross complainant.

III

This cross-defendant denies each and every allegation [fol. 52] contained in the second numbered paragraph II and says that the same is not true in whole or in part and demands strict proof thereof.

As to Second Cause of Action:

I

This cross-defendant re-alleges its answer to paragraphs I and II of said first cause of action and adopts the same as though fully set forth herein.

II

Denies each and every allegation set forth in paragraph III in said second cause of action in said cross-complaint

and says that the same is not true in whole or in part and demands strict proof thereof.

III

This cross-defendant denies each and every allegation contained in paragraph IV of said second cause of action and says that the same is not true in whole or in part and demands strict proof thereof, and this cross-defendant further alleges that if it at any time had possession of said property described in said cross-complaint, or any part thereof, said possession was fairly and voluntarily given by said cross-complainant and was unqualified and absolute and with the full consent of said cross-complainant.

Wherefore, this said cross-defendant prays judgment of the court that cross-complainant take nothing by his suit and that this cross-defendant recover all of its costs in its behalf expended.

Richard F. Bailey, Attorney for Cross-Defendant.

[fol. 53] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Richard F. Bailey, being first duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export and Import Company, a Texas Corporation; that there is no officer, director or agent of said corporation in the State of California; that he verifies this Answer to Cross-complaint on behalf of said Beaumont Export and Import Company, a Texas Corporation; that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to matters and facts therein stated upon his information or belief, and that as to such matters he believes them to be true.

Richard F. Bailey.

Subscribed and sworn to before me this 13th day of November, 1933. Edna Taft, Notary Public in and for Said County and State. My commission expires March 8, 1935. (Seal.)

(Second Verification.)

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, P. M. 4:22, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

EXHIBIT "L" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[fol. 54] No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of W. M. Eggeman in Opposition to Motion to Vacate Default

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. M. Eggeman, being sworn, states:

That he is a citizen of the United States over the age of 18 years, and not a party to the above entitled action, and that for a number of years past, he has followed the occupation of process server, serving legal and court documents in the City and County of Los Angeles, and is familiar with methods commonly and ordinarily used in effecting service.

That affiant recalls being given certain documents for service upon Messrs. Patterson, Bailey & Montgomery, whose office was designated in the Great Republic Life Building; that at the time said documents were handed to affiant for service there was delivered to him a pink memorandum, original of which is attached to the original of this affidavit, and that affiant has used said document for the purpose of refreshing his recol-ection in the making of this affidavit.

That affiant recalls that he went to the Great Republic Life Building and learned that Messrs. Patterson, Bailey and Montgomery no longer maintained an office in such building and was informed by someone of whom affiant inquired that Messrs. Patterson, Bailey & Montgomery were [fol. 55] a law firm in the Title Guarantee Building and that they had moved from the said Great Republic Life Building; that affiant thereupon went to the Title Guarantee Building, at room 810 and inquired of someone relative

to accepting service of the documents which he had for service, and that he was then and there informed by someone there that this was a case of a client of Mr. Bailey, a former member of the firm of Patterson, Bailey & Montgomery who had an office at 808 Quinby Building, and that thereupon and on said day, affiant went to said office in the Quinby Building and inquired for said Richard F. Bailey and was informed that said Richard F. Bailey was not there, but that it was his office and that affiant delivered the copies of said documents to a male person in said office apparently over the age of 18 years, who appeared to be a clerk or office employee in said office, the same being delivered for said Bailey; that thereafter affiant made an affidavit of service of said domuments and filed the same in the office of the clerk of this court.

That thereafter, to-wit, on the 15th day of April, 1933, there was delivered to affiant by the office of Pelton, Warne & Balter, an original and copy of notice of motion for order to enter default, together with a pink memorandum directed to affiant that he serve copy of the same on Richard F. Bailey; that affiant took the copy of said notice together with the original to the office of said Bailey on said 15th day of April, and delivered the same to an office attendant with the statement that there were delivered for service upon Mr. Bailey and that said office attendant then and there procured a signature upon the original of said notice of motion and returned said original to affiant, and that the copy of service was left in said office in said Quinby Building; and that thereafter affiant filed the original of said notice of motion in the office of the clerk of this court. [fol. 56] That the pencil notations on the pink memoranda filed as a part of this affidavit were made by affiant at the time of performance of the acts as hereinabove related.

That affiant has examined the 1933 directory of attorneys issued by Parker, Stone & Baird, and funds listed in the said directory on page 77 thereof the name "Patterson & Montgomery, 810 Title Guarantee Building, Trinity 420 5."

W. M. Eggeman.

Subscribed and sworn to before me this 23rd day of November, 1933. Edith E. Mallory, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

Received copy of the within Affidavit of W. M. Eggeman in opposition to motion to vacate default this 29th day of November, 1933. R. F. Bailey, per L. R. Watters, Attorney for Plaintiff and cross-defendant.

Received copy of the within Affidavit this 29th day of November, 1933. —— ——, Attorney for —— ——.

Filed Nov. 29, A. M. 10:23, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

EXHIBIT "M" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of Clore Warne in Opposition to Motion to Set Aside Default Judgment

[fol. 57] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Clore Warne, being sworn, states:

That he is one of the attorneys for the defendant and cross-complainant, and he is familiar with certain of the proceedings had and taken herein.

That heretofore, to-wit, on or about the 7th day of November, 1932, affiant presented to the presiding Judge of this court, Hon. Harry A. Archbald, verified form of cross-complaint together with affidavit of affiant in support of application for leave to file the same, and made application for, and received leave to, by order of said court then and there made to file said cross-complaint, and that said cross-complaint was thereupon filed in conformity with said order.

That thereafter affiant directed that service be made of a copy of said cross-complaint, affidavit of filing and order upon Messrs. Patterson, Bailey & Montgomery, the attor-

neys who had appeared of record for plaintiff and cross-complainant, and directed that such service be made by W. M. Eggeman, who then did, and for some time theretofore had, served process, legal and court papers for the office of affiant; and that thereafter as affiant is informed and believes and therefore alleges, service was made by said W. M. Eggeman on the office of said Bailey at 808 Quinby Building, on the 9th day of November, 1932, all as will appear more fully by the affidavit of said W. M. Eggeman herein filed.

That thereafter, to-wit, on the 15th day of April, 1933, affiant directed that a certain notice of motion for order to enter default and for judgment upon cross-complaint, which said notice of motion is dated April 14th, 1933, be served [fol. 58] upon the said Richard F. Bailey and that thereafter, as affiant is informed and believes and therefore alleges, a copy of said notice of motion was delivered to the office of said Richard F. Bailey in the said Quinby Building, and that a receipt for service was given and made upon the original by some person purporting to be, or having the authority to represent, the said Richard F. Bailey, and that thereafter said original notice of motion was filed in the usual course with the clerk of said superior court.

That thereafter, pursuant to said notice of motion, the same came on for hearing on the 20th day of April, 1933, in Department 43 of said court, and that affiant appeared as the attorney for the cross-complainant and the maker of said motion, and that when it appeared to affiant that no counsel was present representing the plaintiff and cross-defendant, affiant stated to the court that there might have been some misunderstanding on the part of Mr. Bailey as the surviving member of the firm of Patterson, Bailey & Montgomery, and asked the judge then presiding to hold the matter until he could telephone to said Bailey; that affiant thereupon from the courthouse called the office of said Bailey and was informed by said Bailey that the matter had been overlooked on his calendar and he would appreciate it being continued for one week and that he, said Bailey, would check the matter and call affiant back on the Monday next following, and that affiant then and there next made a pencil notation on the office copy of affiant's notice of motion to the effect as follows: 4-20-33 continued to May 4. Called Bailey, said he would call me Monday. That

thereupon affiant asked said court to continue said matter until the 4th day of May, 1933 and that such order was entered.

That thereafter, affiant not having heard further from said Bailey, on the 4th day of May, 1933, affiant called said [fol. 59] Bailey on the telephone and asked him if he was ready to proceed with the hearing on said motion, and that said Bailey stated to affiant that he was engaged or about to be engaged in a jury trial and in addition he had written to his company, the plaintiff in the action, and would like to await reply from them, and that he would appreciate having the matter go over to and until May 17th, 1933, and that affiant stated that he would be glad to accommodate said Bailey and would arrange for such continuance; and that thereafter affiant called the clerk in Department 43 and arranged with said clerk to have said matter continued for hearing to and until the 17th day of May, 1933 at 10:00 A. M. or as called on the calendar of said court; and that thereupon and to confirm said telephone conversation affiant dictated a letter to said Bailey and when the original of said letter was transcribed, he signed the same and deposited with his Secretary for mailing in the usual course of business and is informed and believes and therefore alleges that said letter was mailed to said Bailey on said 4th day of May, 1933, with sufficient postage thereon to insure delivery, and that a yellow carbon of said letter was placed in the files in said matter in the office of affiant, and copy of which said letter is in words and figures as follows:

"May 4th, 1933.

Richard F. Bailey, Esq., 808 Quinby Building, Los Angeles, California.

DEAR SIR:

Re Beaumont Export & Import Co. vs. Rodolfo Montes

In the above entitled matter, in agreement with my telephone conversation with you of this day, I have had the hearing on our motion to enter default and for judgment [fol. 60] continued until May 17th at 10:00 A. M. It will be called in Department 43 at that time.

In the meantime, if you hear from your company, I will be pleased to have you communicate with me relative to this motion.

Trusting this is satisfactory, I am,

Yours truly, Clore Warne. *Of-* Pelton, Warne & Balter."

CW. L.

Affiant further states and alleges that in the office of Pelton, Warne & Balter at said time, to-wit, on the 4th day of May, 1933 all telephone calls during regular business hours were handled through a switchboard with an operator who then and there kept a record of the calls made, by whom said calls were placed, and the name of the person called together with the number called and that the telephone records of outgoing telephone calls on said 4th day of May, contains in part the following record:

"Outgoing Telephone Calls

Day, 4th. Month, May. Year, 1933

Calling	Name	Number
H. B.	.....	.....
C. W.	Koenig	Tr. 5135
H.B.	Standberry	Mi. 1207
C. W.	Bailey	Tr. 2087
"	"	Tu. 7956
"	Hart	Mu. 0211
"	43	Mi. 9211"

(That for the purpose of deciphering the symbols thereon, the initials "C. W." indicate affiant as the person calling and the initials "H. B." indicate another person in the office and the numeral 43 indicates or purports to indicate a department in the Superior Court called. That a translation of said symbols and data indicates that affiant [fol. 61] called said Bailey or that a call was placed for him at Trinity 2087 and thereafter a call was placed for such Bailey at Tucker 7956 and that thereafter a call was placed for affiant with the clerk of Dept. 43 of the Superior Court.)

Affiant further notes that upon the 1933 directory of attorneys for the City of Los Angeles, published by Parker,

Stone & Baird, Checked by the telephone operator for the purpose of her assistance in making telephone calls there appears in the particular copy kept by said telephone operator on P. 21, the printed named, address and telephone number of said Bailey in words and figures as follows: "Bailey, Richard F., 808 Quinby Building, Trinity 2087." that immediately to the right in pencil notations there appears the following: "Tu. 7956." That affiant notes that the present telephone number of said Richard F. Bailey as noted upon the moving papers in this notice of motion to set aside default is "Tucker 7956."

That thereafter, affiant did not hear from said Bailey further and appeared in Department 43 and presented the motion of defendant and cross-complainant, and that thereupon the court made an order that said motion should be granted, all as will more fully appear from the notice of motion, records and minutes of said court as the same appear in the office of the clerk thereof in said file and proceedings, to which said records and files reference is hereby made.

That affiant has read the affidavit of Richard F. Bailey, subscribed and sworn to on the 11th day of November, 1933, and alleges the fact to be that it is not true that the first notice or knowledge which came to said Bailey of the filing of said cross-complaint was on the 8th day of September, 1933, and that it is not true that affiant knew nothing about [fol. 62] the filing of said cross-complaint or of any matters pertaining thereto until after the service of said notice of entry of judgment on or about September 8th, 1933. On the contrary, affiant alleges that the communications had with Bailey as aforesaid, said Bailey was advised that a cross-complaint had been filed by defendant and cross-complainant and in such conversations he stated that he had knowledge of said motion by reason of the notice theretofore served upon and desired certain additional time, all as will more fully hereinbefore appear.

That affiant calls attention to the fact that the proposed answer to cross-complaint offered in support of said motion is verified by Richard F. Bailey as the "attorney for plaintiff and cross-defendant", and that said answer to cross-complaint contains direct denials of the material allegations of said cross-comlpaint; that affiant is informed and believes and therefore alleges that said Richard F. Bailey has no direct knowledge of the matters and things alleged and set

forth in said cross-complaint and has no knowledge sufficient to enable him to verify said answer to cross-complaint and the allegations and denials therein contained as of his "own knowledge", and that in this regard affiant is informed and believes and therefore alleges the fact to be that the chattels in said cross-complaint referred to were converted by the plaintiff and cross-defendant at and in the City of Mexico, Republic of Mexico, and that all the facts and circumstances happened and took place in said city of Mexico.

Affiant further states that the default in said action was not entered, because of, or as the result of any mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross-defendant's counsel.

Clore Warne.

[fol. 63] Subscribed and sworn to before me this 28th day of November, 1933. Edith E. Mallory, Notary Public in and for the county of Los Angeles, State of California. (Seal.)

Filed Nov. 29, A. M. 10:23, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

Received copy of the within affidavit of Clore Warne, etc., this 29th day of November, 1933. R. F. Bailey, per L. R. Watters, Attorney for plaintiff and cross-deft.

EXHIBIT "N" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Counter Affidavit of Richard F. Bailey

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Richard F. Bailey, being sworn states: that affiant has checked the records of his office and daily calendar and finds

no record of any conversation had with one Clore Warne, as set forth in the said Clore Warne's affidavit in opposition [fol. 64] to the motion on file hereon. That affiant has no recollection of any such conversation or of any conversation with the said Clore Warne upon said 20th day of April, 1933, pertaining to the subject mentioned in said affidavit, and to the best of affiant's belief, no such conversation was engaged in between affiant and the said Warne on or about said date, or on any other date, pertaining to said subject;

That as regards said alleged conversation of May 4th, 1933, affiant's calendar shows on said May 4th, 1933, a notation as follows: "Re San Pedro Matter"; that to affiant's best recollection on said 4th day of May, 1933, affiant was in the City of San Pedro the entire day on business for one A. Grove Knutsen and that affiant was not in affiant's office on said date; that affiant's calendar for several days prior to May 4th, 1933 and at least six days thereafter shows no record of a jury or other trial matter; that as regards said purported letter, a copy of which is set forth in paragraph 4 of the said Warne's affidavit, the files of affiant reflect the receipt of no such letter and affiant has no recollection and therefore believes that no such letter, if posted, was ever received by affiant.

That affiant re-affirms the statements in affiant's said original affidavit as regards the first notice or knowledge of any kind this said affiant had of the entry of said judgment or of the filing of the said cross-complaint.

That as regards the statement in said Warne's affidavit that affiant had no knowledge of the matters and things set forth in said answer accompanying said motion, affiant states that said information was obtained by said affiant in two telephone conversations with the attorney for said plaintiff at Beaumont, Texas, and each and every of said allegations in said answer are based upon the information furnished directly to affiant by said attorney for said plaintiff in Beaumont, Texas, and affiant believes that said [fol. 65] allegations are true and that said plaintiff has a good, sufficient and meritorious defense to said cross-complaint, as set forth in said answer.

That since reading the affidavit of W. M. Eggerman, affiant has made inquiry of the lawyers associated with said affiant and of each and every attendant and office employee and has thoroughly checked or caused to be checked the office files of each and every attorney connected with said

office and affiant has been unable to locate said documents mentioned as having been delivered to the office of affiant by the said W. M. Eggerman and has failed to locate, after diligent search, any record of the receipt of either of said two documents; and affiant further states that this affiant has been practicing law actively in the City of Los Angeles for more than ten years continuously last past and that this is the first occasion upon which this affiant has ever been called upon to present in that entire period of time a motion to set aside a judgment of default under Section 473; that this affiant has at all times been careful to note the receipt of all pleadings requiring an answer and of the date that said answer was required or action required to be taken, and that affiant truly believes that, if either of said documents came to affiant's attention, or if said conversation as alleged took place, this affiant would remember it; that on the contrary this said affiant has no recollections whatsoever of having had a conversation or conversations, as set forth in said Warne's affidavit, and has no recollection whatever of ever having seen said documents, or either of them, at any time prior to the time set forth in affiant's said original affidavit.

Richard F. Bailey.

Subscribed and sworn to before me this 7th day of December, 1933. Edna Taft, Notary Public in and for Said County and State. (Seal.)

[fol. 66] Received copy of the within Affidavit this 11th day of December, 1933. Pelton & Warne, by C. Warne, Attorney for Defendant.

Filed Dec. 13, P. M. 3:00, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

Exhibit "O" to Petition

In the Superior Court of the State of California in and for the County of Los Angeles

No. 279850

Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

Rodolfo Montes, Defendant and Cross-Complainant

Affidavit of Clore Warne on Motion to Dismiss

State of California,
County of Los Angeles, ss:

Clore Warne, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant, and he is familiar with all of the proceedings had and taken herein.

That a copy of the summons and complaint in the above entitled action was served on June 1, 1929, on the defendant Rodolfo Montes and thereupon the same was brought to your affiant to make proper answer or plead thereto; that thereafter on June 6, 1929, a stipulation was entered into between counsel for the parties hereto, extending the time within which the defendant could appear in the above action. That on or about the 12th day of July, 1929, a demurrer having been interposed to the complaint above referred to, the same was sustained and the plaintiff required to amend its complaint. That on July 18, 1929, an [fol. 67] amended complaint was served on your affiant and on or about the 22nd day of August, 1929, an answer was served and filed for and on behalf of the above defendant. Subsequent thereto a stipulation having been entered into between counsel for the parties hereto, an amendment to the said answer was served and filed on October 19, 1929, and the said cause has been at issue and ready for trial since the said 19th day of October, 1929; that no motion or proceeding whatsoever has been made or taken by plaintiff, or at all, to set said cause for trial, nor have any further steps or proceedings been taken by

the plaintiff since the said 19th day of October, 1929, to prosecute the said cause.

That the defendant has been at all times since October 19, 1929, ready to try said cause and that plaintiff's delay to bring said cause to trial is wholly unexcusable and not caused by any act or acts or omission of defendant or his counsel. That there is no stipulation entered into between the parties hereto extending the time within which the trial of the within cause may be had.

Clore Warne.

Subscribed and sworn to before me this 29th day of January, 1935. Edith E. Mallory, Notary Public in and for the said County and State. (Seal.)

Filed Jan. 31, 1935. L. E. Lampton, County Clerk, by Jay E. Davis, Deputy.

EXHIBIT "P" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

December 12, 1933.

Present Hon. Lester Wm. Roth, Judge

[fol. 68] Department 43

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, ETC., Plaintiff,

vs.

RODOLFO MONTES, Defendant

Motion to set aside default and file answer comes on for hearing, R. F. Bailey appearing as attorney for plaintiff and Pelton & Warne for Defendant; said motion is denied.

I certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior court.

Exhibit "Q" to Petition

Superior Court Los Angeles County

No. 279850

Beaumont Export & Import Co., Plaintiff,

—

Rodolfo Montes, Defendant

Patterson, Bailey & Montgomery, Attorney for Plaintiff.
Pacht, Pelton & Warne, Attorney for Defendant.
Nature of Action: Goods, Wares and Merchandise.

Year	Month	Day	Proceedings	Reporter	Dept. No.	Judgment Book Page	Fees
1929,	May	31.	Complaint filed—Summons issued. Aff and Bon on Attcht filed Surety: Fidelity and Deposit Company of Maryland Amount: $1600.00—Writ Issued				7
	Jun.	12.	Sums filed				
	"	13.	Writ of Attcht filed				
	"	24.	Dem of Deft filed Pacht, Pelton & Warne				2
	"	24.	Notice that Security for costs required filed				
	"	27.	Non Resident Bond for costs filed Fidelity & Deposit Co. of Md. Sureties $300				
[fol. 69]							
	"	28.	Dem contd July 12		Dept. 7		
	July	12.	Dem sustained—10 days		Dept. 7		
	"	19.	Amd. Comp filed				
	"	29.	Dem to and comp filed				
	Aug.	2.	Dem to amend. cop. sustained as to first cause and overruled as to third cause—10 days		Dept. 20		
	"	22.	Ans. to amed comp filed				
	Oct.	19.	Amdt to ans of deft filed				
	Nov.	7.	Order permitting filing of x comp & aff thereon filed				
	"	7.	Cross comp filed				
1932,	Nov.	12.	Aff of service filed				
1933,	Apr.	15.	No of motion Apr. 20–10 A. M. for ord. to enter default, etx. filed		Dept. 43		
	"	20.	cont. to May 4		D 43		
	May	4.	cont. to May 17		D 43		
	"	17.	Motion granted		D 43		
	"	25.	Judgt filed		D 43		
	"	31.	Judgment entered			867; 262	
	"	31.	Judgment docketed				
	Jun.	1.	Judgment Roll filed				
	"	8.	Assignment of Jugt by Rudolfo Montes to Consuelo H. de Montes filed				
	Sep.	8.	No of entry of judgt filed				
	"	20.	Assignment of judgment to Esteban Adam filed				
	Nov.	17.	Not of Mo to set aside default Nov. 23–10 A. M. Dept. 43 filed				
	"	17.	Aff Supporting motion filed				

Proceedings				Book Page	
Year	Month	Day	Reporter	Dept. No. Judgment	Fees
1933,	Nov.	17.	Proposed Ans. filed		
	"	23.	Mo to set aside default contd to Dec 10	D 43	
[fol. 70]					
	"	29.	Aff of Clore Warne filed		
	"	29.	Aff of W. M. Egglman filed		
	Dec.	1.	Mo. to set aside default contd to Dec. 7	D 43	
	"	7.	Motion cont to Dec. 12	D 43	
	"	12.	Mo. to set aside default denied	D 43	
	"	13.	Counter Aff of R. F. Bailey filed		
1935,	Jan.	31.	Aff of Clore Warne on motion to dismiss filed		
	"	31.	Judgment of dismissal filed		
	"	31.	Memo. of costs filed		
	Feb.	2.	Judgment entered		897; 313
	"	2.	Judgment docketed		
	"	4.	Judgment Roll filed		

EXHIBIT "R" TO PETITION

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation,

vs.

RODOLFO MONTES

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, L. E. Lampton, County Clerk of the county of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify and attest the foregoing to a full, true and correct copy of the original complaint, Summons issued May 31, 1929, Demurrer to complaint, Notice that Security for costs is required, Amended Complaint, Demurrer to Amended Complaint, Answer to Amended Complaint, Amendment to Answer to Amended Complaint, Order permitting filing of cross complaint including affidavit in support thereof, Cross Complaint, Affidavit of Service of Cross Complaint, Notice of Motion for order to enter default and for judgment upon cross Complaint, Judgment (Book 867, page 262), Assignment of Judgment (filed Jun. 8, 1933), Notice of entry of judgment, Assignment of Judgment (filed Sep. 20, 1933),

Notice of Motion to set aside default, Affidavits (3) in support of motion to set aside default judgment, proposed Answer to Cross Complaint, Affidavit of W. M. Eggeman in [fol. 71] opposition to motion to vacate default, Affidavit of Clore Warne in opposition to Motion to set aside default judgment, Counter Affidavit of Richard F. Bailey as to default judgment, Affidavit of Clore Warne on motion to dismiss, and jurgment of Dismisal (Book 897, page 313), on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior court of the State of California, in and for the County of Los Angeles, this 27th day of June, 1935.

L. E. Lampton, County Clerk of the County of Los Angeles, State of California, and ex-Officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Edward T. Bishop, Judge of the Superior Court of the State of California, in and for the county of Los Angeles, do hereby certify that L. E. Lampton is County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles (which court is a court of Record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said L. E. Lampton as such officer; that the seal annexed thereto is the seal of said Superior Court; that said L. E. Lampton, as such clerk, is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my [fol. 72] official character as such judge, at the city of Los Angeles, County and State aforesaid, this 27th day of June, A. D. 1935.

Edward F. Bishop, Judge of the Superior Court of the State of California, in and for the County of Los Angeles.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, L. E. Lampton, County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles (which court is a court of Record, having a seal which is annexed hereto) do hereby certify that Edward T. Bishop whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Superior Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior Court, at my office in said County, this 27th day of June, A. D. 1935.

L. E. Lampton, County Clerk of the County of Los Angeles, State of California and ex-Officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

[File endorsement omitted.]

[fol. 73] IN DISTRICT COURT OF JEFFERSON COUNTY

[Title omitted]

ORIGINAL ANSWER OF WM. SAENGER ET AL—Filed June 8, 1935

Comes defendants William Saenger, P. P. Butler, H. A. Perlstein, and W. H. Garretson, individually and as trustees for the Beaumont Export and Import Company, a dissolved corporation, and answering for themselves alone plaintiff's original petition filed herein May 27, 1935 and says:

(1) Plaintiff's suit herein should be abated and dismissed because there appears from said petition a misjoiner of parties defendant, and cause of action in that plaintiff's petition shows no joint liability of defendants

as individuals, and cause of action against the trustees of the dissolved corporation, if to charge its assets in their hands, is against them as trustees and not against the stockholders, and of this they pray judgment of the court.

(2) These defendants demur generally to plaintiff's said petition and say same shows no cause of action against them and of this they pray judgment of the court.

(3) They specially except to said petition because the same shows that the judgment herein mentioned and upon which the said cause of action is founded, is not final but interlu-tory, and not one upon which suit can be maintained.

(4) They further specially except to said petition because the same shows that the corporation defendant in said judgment herein set out had no legal existence at the time of rendition of said judgment and no legal judgment could have been rendered against it.

(5) They further specially except to said petition because the judgment therein set out is a personal judgment against a non resident of the state, over whose person the [fol. 74] court had and could acquire no jurisdiction.

(6) They further specially except to said petition because no liability on the part of these defendants either as trustees or as individuals for any debts of the corporation is shown.

(7) They further specially except to said petition and to that portion thereof wherein it is alleged that the judgment therein set out is a final judgment, because same is a conclusion of law and the terms of said judgment are not shown, and it cannot be determined whether the same be a final judgment or not.

(8) They further specially except to said petition because said petition shows upon its face that the judgment therein sued on is dormant and does not furnish the basis for a suit thereon except to revive the same, and of all these said special exceptions these defendants pray judgment of the court.

(9) It required to further answer herein, these defendants deny all and singular the allegations in said petition contained, and demand strict proof of same, and of this they put themselves upon the country.

(10) Specially answering herein these defendants say that if any judgment was ever rendered as set out in plaintiff's petition, the court rendering the same was without jurisdiction and right to render such judgment, because the same was rendered upon a cross action filed in a pending suit, and which said pending suit had been, and was at the time of the filing of such cross action, stayed and abated, pending and until the termination of a suit between the same parties in regard to the same subject matter pending in the Republic of Mexico, and over which the court in which said suit was pending, had jurisdiction of the subject matter and the parties.

(11) Further specially answering herein these defendants say that long prior to the filing of the action in the court of California, set out in plaintiff's petition by the [fol. 75] Beaumont Export & Import Company, against the defendant therein Rodolfo Montes, and in which the cross action shown in said petition is alleged to have been filed; the subject matter of said suit and of said cross action being personal property, was sold by Beaumont Export & Import Company, which was a corporation existing under the laws of Texas, a citizen of Texas and not a citizen of the Republic of Mexico, and doing business at Beaumont, in Jefferson County, Texas, and in the course of its business it had sold in regular course said property and other property personal in nature to said Rudolfo Montes, a citizen of said Republic of Mexico, and residing in said Republic, and which said property was shipped to and delivered to him in said Republic of Mexico, and upon due date for said merchandise, the said Montes had failed and refused to pay the agreed purchase price therefor and suit had been instituted by said Beaumont Export and Import Company against him in the courts of his domicile in the Republic of Mexico, wherein same was at all of the times herein mentioned pending and at issue in said courts of the Republic of Mexico, having jurisdiction of same until the same was finally terminated in said courts, as will be more fully hereinafter shown.

That pending said suit in the said Republic of Mexico, and after a trial thereof in an inferior but trial court of said Republic, the said defendant, Montes, removed himself and much of his belongings beyond said Republic and took up his residence in Los Angeles County, California,

where, after his said removal to said point, and while said cause was pending in the courts of Mexico as aforesaid, the said Beaumont Export & Import Company brought their action against him in Los Angeles County, California, upon the same and identical cause of action thereafter in said Los Angeles suit the said Montes obtained from said Los Angeles Court a stay of proceedings in said court, upon [fol. 76] the plea that the cause of action was legally pending and undetermined and further action thereon in the said Los Angeles County Court should be stayed and abated until final action had been had in the courts of said Republic of Mexico, and thereafter said cause of action and suit and all proceedings therein stood abated and stayed until the final determination of said controversy should be reached in the courts of said Republic of Mexico.

That thereafter said Beaumont Export & Import Company duly dissolved as a corporation and these defendants, as its directors at the time of its dissolution, took over, under the laws of its domicile, its corporate properties for the purpose of winding up its affairs, in conformity of the laws of the State of Texas, under which said corporation had its legal existence. That thereafter said cause of action pending in the Republic of Mexico passed legally through the courts of said Republic and final judgment was entered in the same in said courts in favor of said Beaumont Export & Import Company, which fully and finally settled all of the controversies between said company and said defendant, Montes and became and was a full final and complete settlement thereof, and a complete bar to any further action on the same or any portion of the same, and in which said judgment said corporation plaintiff had judgment for the amount of its debt with legal interest thereon and costs, and thereafter through due and legal process through the courts of said country, the Beaumont Export & Import Company collected its said judgment.

At some time, not known to these defendants and without any notice to them of any character, and as said cause in the said courts of said California had been stayed, and while said cause of action was being prosecuted and defended in the courts of Mexico, as hereinbefore shown, some character of cross action asking for affirmative relief was filed against said corporation, and without notice to said [fol. 77] corporation or to these defendants, and without knowledge on their part there was obtained through some

means not known to them, a judgment which has never been seen by these defendants and they do not know the nature and terms thereof, except as set out in plaintiff's petition herein.

These defendants show that under the facts hereinbefore recited, said pretended judgment set out in plaintiff's petition is wholly void and no cause of action exists against them by reason thereof, and all of this they put themselves on the country.

Geo. E. Holland, Attorneys for said Defendants.

[File endorsement omitted.]

[fol. 78] In District Court of Jefferson County

[Title omitted]

Original Answer of John F. Pipkin et al.—Filed June 8, 1935

Came defendants, John F. Pipkin, Morris M. Mothner, Mrs. Jenet Smith, Wm. Wahrmund, Mrs. B. R. Norvell, A. M. Kaufman, John Dollinger, Mrs. Lucy Sanders, Ray Hoopes, H. A. Sanders, and answering plaintiffs petition filed herein, in which they are named as parties defendant, they hereby adopt, for all purposes, and make as their own the answer to plaintiff's petition, of their co-defendants, Wm. Saenger et al., this day filed in this cause and pray as therein and in all things.

Geo. E. Holland, Attorney for the Defendants.

[File endorsement omitted.]

[fol. 79] In District Court of Jefferson County

[Title omitted]

Original Answer of Defendant C. A. Lord—Filed June 5, 1935

Comes now C. A. Lord, one of the defendants in the above entitled and numbered cause, and answers herein as follows:

1

This defendant excepts to the plaintiff's petition and says that on the face of the same it shows a misjoinder of

parties and a misjoinder of causes of action, and that no matters or facts are alleged that would entitle the plaintiff to join this defendant with the other defendants or any of them, and that no matters or facts are alleged that would show any common liability on the part of the defendants named in this suit or as between this defendant and the other defendants or any of them; on the contrary, all of the facts affirmatively show that there is not and cannot be any common liability that would permit this defendant to be joined with the other defendants or any of them. And of this special exception this defendant prays judgment of the court, and prays that said suit be dismissed or that in any event he be dismissed from the case as one of the defendants herein.

2

This defendant denies each and every, all and singular, the allegations in plaintiff's petition contained, demands strict proof thereof, and of this he puts himself upon the country.

C. A. Lord, Attorney for Himself.

[File endorsement omitted.]

[fol. 80] In District Court of Jefferson County

[Title omitted]

Plaintiff's Reply to Demurrers and Answers of William Saenger, P. P. Butler, S. A. Perlstein and W. H. Garretson Individually and as Trustees of Beaumont Export & Import Company—Filed November 1, 1935

Now comes Estaban Adams, plaintiff in the above entitled and numbered cause, and replying to the demurrers and answers filed herein by William Saenger, P. P. Butler, H. A. Perlstein and W. H. Garretson, individually and as trustees of the Beaumont Export & Import Company, constituting a part of the defendants herein, respectfully alleges and shows unto the court:

1. That the allegations of said defendants, as set forth in paragraph 10 of their said pleading, to the effect that another suit was pending in the City of Mexico in the

Republic of Mexico when the judgment upon the cross-action was obtained, as set forth in plaintiff's original petition, and that the said suit, in which the judgment herein sued on was obtained, was stayed and abated by reason of the pendency of such suit in Mexico, are wholly immaterial and irrelevant and constitute no defense to the cause of action now sued on in this court; and, therefore, plaintiff moves the court to strike the said pleading and all the allegations as shown in said paragraph 10; and of this he prays judgment of the court.

2. Plaintiff further shows unto the court that the allegations in paragraph or section 11 of said defendants' pleadings, and especially the first three paragraphs thereof and down to the paragraph thereof commencing "At sometime not known to these defendants and without any notice to them of any character," etc., all directly relate to the alleged merits of the original suit on the cross-action and constitute an attempt to set forth a defense to said cross-action on the merits, and, therefore, are all immaterial and [fol. 81] irrelevant and can constitute no defense to the cause of action now sued on before this court, because the merits of the original cross-action or suit or cause of action upon which the judgment was obtained in the California court are not and cannot be involved in this cause of action now before the court, which is brought upon the new cause of action created by the said judgment obtained in California and payable to the plaintiff and his predecessors in title; and, therefore, plaintiff prays and moves the court to strike every and all of said allegations from the record.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 82-83] In District Court of Jefferson County

[Title omitted]

Order Sustaining General Demurrer and Dismissing Cause

On this the third day of December, A. D. 1935, this cause being regularly called for trial, came the parties plaintiff

and defendants by their respective attorneys of record and announced ready for trial upon the demurrer and exceptions of the defendant to plaintiff's first amended original petition and thereupon the court heard the general demurrer of the defendants to plaintiff's said petition with the argument of counsel thereon and being fully advised in the premises is of the opinion that defendants said general demurrer should be in all things sustained.

It is therefore ordered, adjudged and decreed by the court that defendants general demurrer to plaintiff's first amended original petition be and the same is hereby in all things sustained, and the plaintiffs in open court declining to amend their said petition further it is the order of the Court that plaintiffs said suit herein be and the same is hereby finally dismissed and that the defendants have and recover of plaintiffs all costs in this cause incurred and expended for which let execution issue.

To which judgment of the court plaintiffs in open court except and give notice of appeal to the court of Civil Appeals of the Ninth Supreme Judicial District of Texas at Beaumont, Texas.

R. L. Murray, Judge Presiding.

O. K. as to form. M. G. Adams, Atty. for Plfs.

[fols. 84-87] Bond on Appeal for $300.00, approved and filed December 9, 1935, omitted in printing.

[fols. 88-105] [File endorsement omitted.]

[fols. 106-113] In Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont

No. 2988

Estaban Adam, Appellant,

vs.

William Saenger et al., Appellees

Appealed from the District Court of Jefferson County Texas

Brief for Appellant—Filed May 6, 1936

[fol. 114] Assignments of Error

First Assignment of Error

The trial court erred in sustaining the general demurrer and dismissing plaintiff's cause of action, for that, in so doing it failed and refused to give "full faith and credit" to the final, valid and subsisting judgment duly entered of record by a superior court of California having general jurisdiction, after due service of notice and citation, in accordance with the applicable laws of the State of California; and thereby the trial court failed to fulfill and to comply with its duty as expressly prescribed by Article 4, Section 1 of the Constitution of the United States, which said constitutional provision is of the tenor following:

"Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof."

Second Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the express allegations of the petition show that the Beaumont Export & Import Company, a Texas corporation, filed its suit for alleged debt against Rodolfo Montes, a resident citizen of Los Angeles County, California, in a superior

court of the State of California having general jurisdiction, and thereby voluntarily submitted itself to the jurisdiction [fol. 115] of that court, and to the procedural laws of the State of California; that thereafter, in due course, and by permission and under express orders of that court, the said Rodolfo Montes filed his cross action against the said Beaumont Export & Import Company and duly obtained the service and gave the notice required by the laws of California applicable to such cross actions; and that after due service and notice, the said Beaumont Export & Import Company having wholly made default, whereupon final judgment was duly rendered by said court in favor of said Montes and against the said cross defendant, Beaumont Export & Import Company.

Third Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, the express allegations of plaintiff's first amended original petition show that under the laws and the controlling decisions of courts of last resort of the State of California, a judgment rendered on such cross action is a final judgment, without regard to what action is taken on the main or plaintiff's cause of action, or whether or not any final disposition of it is ever made, and that such cross action is regarded and construed, under the California laws, as a cause of action wholly separate and distinct from the main action.

[fol. 116] Fourth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the allegations of plaintiff's first amended original petition expressly show that on September 15, 1930, the Beaumont Export & Import Company was voluntarily dissolved by the action of its stockholders in accordance with the laws of the State of Texas; that such dissolution was had sometime after the said corporation had filed its said suit in the California court against Montes and while said suit was still pending; that no notice of such dissolution was ever brought to the attention of the California court or to Montes or to his attorneys; that on November 7, 1932, Montes filed his said cross action, upon which due service was had on November 12, 1932, in accordance with the California laws; that

the said Beaumont Export & Import Company failed to answer to said cross action and that thereupon, on April 15, 1933, its attorney of record was given due notice of the motion to enter default judgment and that said motion was continued from time to time at the request of the attorney of record for the Beaumont Export & Import Company, but that notwithstanding, the said cross defendant continued in default, failing to answer or to make any defense to the cross action, whereupon the motion of Montes to enter default judgment was granted on May 7, 1933, and the said judgment thereafter, upon further notice to the said attorney of record for the Beaumont Export & Import Company, was duly entered of record, after fair and [fol. 117] full notice and opportunity was given and granted the said cross defendant to appear and make its defense, and that, therefore, the said California judgment is justly entitled to be given full faith and credit in, and by the courts of, the State of Texas.

Fifth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the express allegations of plaintiff's pleading show that after default judgment on the said cross action had been duly entered, as heretofore shown, the statutory trustees of the Beaumont Export & Import Company in actual charge, control and management of the assets of said dissolved corporation, retained Richard F. Bailey as their attorney, he being the same attorney that appeared of record and previously represented the Beaumont Export & Import Company in the said California litigation, and the said statutory trustees and the said attorney thereupon made their appearance in the said California court, but made such appearance and acted through the Beaumont Export & Import Company and filed their motion to set aside the said default judgment, and thereupon expressly put in issue and litigated before that court all of the facts relating to whether or not the Beaumont Export & Import Company had been duly served and given proper notice, as required by the laws of California as a condition precedent to the entry of the said default judgment against it in said cross [fol. 118] action, and the said California court, after hearing the evidence on said issue and the argument, duly

overruled their said motion to set aside the default judgment, and the said court, by necessary implication, thus found all of said fact issues against the movants. Wherefore, all of the fact issues of whether or not the Beaumont Export & Import Company was properly served and notified, as required by the laws of California, having been determined by the California court against the said corporation, and the said statutory trustees, as well as those that were stockholders at the time of its dissolution are res judicata among all the parties to the litigation and the Beaumont Export & Import Company and its statutory trustees at the time of its dissolution and its stockholders are thereby estopped to assert any lack or want of such proper service and notice.

Sixth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, the express allegations of plaintiff's petition show that the Beaumont Export & Import Company filed its suit in the said California court and voluntarily submitted itself to its jurisdiction, and that while the said suit was pending its stockholders voluntarily dissolved it under the laws of Texas on the 15th day of September, 1930; that under the [fol. 119] laws of the State of Texas the said Beaumont Export & Import Company could sue and be sued for a period of three years from the date of its dissolution and that said Texas laws were applicable to the suit then pending in California; and that, consequently, when the judgment by default on the cross action was entered, to-wit, on the 31st day of May, 1933, the said Beaumont Export & Import Company, notwithstanding its dissolution, could still sue and be sued in California under and by virtue of the said statutory provisions of Texas; that when the statutory trustees, acting in the name of Beaumont Export & Import Company, filed their motion in said cause through their attorney, to-wit, on the 17th day of November, 1933, to set aside the said default judgment, the Beaumont Export & Import Company was defunct and without power to sue or be sued, but that notwithstanding, the statutory trustees filed their said motion and prosecuted the hearing thereon in the name of said corporation and knowingly or fraudulently or negligently failed to disclose to the court

or to Montes or to his attorneys that the said Beaumont Export & Import Company had been legally dissolved and that it was then without power or authority to sue or be sued under the laws of Texas, and, consequently, under the laws of California. Wherefore, the statutory trustees of the Beaumont Export & Import Company were the real parties at interest in filing the said motion to set aside the default judgment and in litigating the facts in support of said motion and in thus putting in issue their supporting evidence tending to show lack of service or notice on the Beaumont Export & Import Company upon which the [fol. 120] said default judgment was obtained and in litigating all of the fact issues relating to such service and notice, and that thereby they are conclusively estopped to assert that they are not the real parties at interest in said litigation and further estopped to assert improper or inadequate or lack of service and notice upon the Beaumont Export & Import Company on the said cross action; and the judgment and order of the California court overruling the said motion, after hearing the evidence and trying out the fact issues, is res judicata as to all of the said issues between the parties to this suit.

Seventh Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, even if there had been any defects of service on the cross action or with respect to notices of the motion for a default judgment (which is not admitted but expressly denied) the fact that Richard F. Bailey, attorney of record originally for Beaumont Export & Import Company and after its dissolution for the statutory trustees and stockholders of said corporation, obtained, at his request, or agreed to, two continuances of the motion that the court enter the default judgment upon which this suit is based, constitute a waiver, as a matter of law, of any and all defects of service, or even of a total failure of service; the allegations of plaintiff's petition expressly showing that the said attorney had [fol. 121] requested and had obtained two continuances of the hearing of said motion.

Eighth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the allega-

tions of his petition expressly show that he was the legal and equitable owner and holder of the said valid and subsisting judgment and all rights thereunder and that the said judgment was not barred by limitation nor otherwise invalidated.

Ninth Assignment of Error

It appearing from the allegations of the petition that the California procedure with respect to giving notice to the adverse party and affording ample opportunity to be heard before entry of judgment was strictly followed with respect to said cross action and that the said California procedure actually afforded an opportunity to the defendants to be heard and to have their day in court and was not in any wise inconsistent with the general canon of jurisprudence requiring that a defendant be offered a hearing before his rights can be affected by judicial action and are in substantial harmony with the laws of Texas applicable to the same or like facts and subject matter, the judgment of the lower court was an unreasonable denial of the rights accorded plaintiff under Article 4, Section 1, of the Constitution of [fols. 122-251] the United States, and an arbitrary refusal to give full faith and credit to said "public acts, records and judicial proceedings" of the State of California; and the said judgment probably resulted from the identical local influences the said constitutional provision was designed to defeat.

Tenth Assignment of Error

The court erred in sustaining the general demurrer, for that, the pleadings show a final, valid, subsisting and unsatisfied judgment rendered by a California court of general jurisdiction and of record, having jurisdiction of the subject matter, and after obtaining jurisdiction of the Beaumont Export & Import Company and of the statutory trustees thereof, upon its dissolution, and after their voluntary submission to the jurisdiction of said court, and the said pleadings further expressly and definitely show all of the other elements of a cause of action upon said judgment; and the action of the trial court was an arbitrary denial of the "full faith and credit" clause of the Constitution of the United States.

[fol. 252] [File endorsement omitted]

IN COURT OF CIVIL APPEALS OF TEXAS

No. 2988

ESTABAN ADAM, Appellant,

vs.

WILLIAM SAENGER et al., Appellees

OPINION—Filed January 28, 1937

This is a suit by Estaban Adam against William Saenger, et al., as officers, directors and statutory trustees of the Beaumont Export & Import Company, a defunct Texas organization, to recover on a judgment obtained in one of the Superior Courts of the State of California, County of Los Angeles, by Rodolfo Montes, against the Beaumont Export & Import Company, a Texas corporation, on his cross-complaint, in the sum of $5,000.00 and costs of court; Adam being the owner of said judgment by purchase for a valuable consideration.

The facts leading up to said judgment in favor of Montes on his cross action against said Beaumont Export & Import Company are: on May 31, 1929, the Beaumont Export & Import Company, a Texas corporation, as plaintiff, filed suit against Rodolfo Montes, defendant, in the Superior Court of Los Angeles County, California, said suit being numbered 279850, for the sum of $6,043.37, same being the purchase price of certain fixtures, goods, wares and merchandise alleged to have been purchased by said Rodolfo Montes from said Beaumont Export & Import Company, and by it shipped and delivered to Montes at his place of business in the City of Mexico in Mexico. Said company filed an amended petition in said cause on July 18, 1929.

Montes, the defendant, filed his answer in said suit on August 22, 1929, and on October 19, 1929, filed an amended answer setting up a plea in abatement.

On September 15, 1930, the Beaumont Export & Import Company, by the voluntary action of its stockholders in accordance with the laws of Texas, dissolved said corpo- [fol. 253] ration and filed with the Secretary of State a certificate of such action, and he gave a certificate of its disso-

lution. Notice or information of its dissolution was not given to the California court where the suit was pending, nor was any action taken looking to the dismissal of said suit, or to in any manner dispose of same, but same was left pending on the docket.

Some two years later, on November 7, 1932, by permission of the court, Montes filed in said cause a cross-complaint against the Beaumont Export & Import Company to recover of it for the value of certain goods and chattels (enumerating them) alleged to have been unlawfully converted by cross defendant, of the alleged value of $5,000.00. Service on or notice to said Beaumont Export & Import Company of the filing of this cross action by Montes against it was by leaving a notice at the office of Richard F. Bailey in Los Angeles, California, he being a lawyer and a member of the law firm that represented said Beaumont Export & Import Company in filing its suit against Montes. This notice to Bailey of the filing of the cross action, was on November 11, 1932. Judgment by default in favor of Montes against the Beaumont Export & Import Company for $5,000.00 and costs of suit was rendered on May 24, 1933, and entered of record May 31, 1933. Notice of this judgment was given Bailey on September 6, 1933. On November 17, 1933, Bailey, purportedly acting for Beaumont Export & Import Company, filed motion to set aside the judgment against said company, contending that no notice of the filing of the cross action was ever, in any manner, given him, and at the same time he filed answer to the cross action. The motion to set aside the judgment upon hearing was overruled, and so the answer was not considered. No appeal or action of any kind was taken from these proceedings. Montes assigned the judgment to Consuelo H. DeMontes on June 6, 1933, and she assigned the judgment [fol. 254] to Estaban Adam, appellant, on September 20, 1933. On January 31, 1935, the suit by the Beaumont Export & Import Company against Rodolfo Montes, No. 279850, was dismissed for want of prosecution.

The instant suit was brought in the 60th District Court of Jefferson County, Texas, on May 27, 1935, against appellants to establish and recover on the above mentioned judgment. We shall not undertake to state the substance of appellant's petition, but will say that his asserted right was fully and admirably pleaded, and his prayer ample. The defendants, William Saenger, P. P. Butler, H. A. Perlstein,

and W. H. Garretson, answered individually and as trustees for the Beaumont Export & Import Company (the dissolved corporation, cross defendant in the California suit) by pleas in abatement, general demurrer, special exceptions, general denial, and several special matters of defense not believed necessary to state. The other defendants answered adopting the pleadings of William Saenger, et al., and by filing general demurrer and general denials. The general demurrers of all the defendants were sustained by the court, and plaintiff, appellant, refusing to amend, the suit was dismissed.

The judgment will have to be affirmed, because, in our opinion, the court rendering the judgment was without jurisdiction to render same for want of jurisdiction over the cross defendant in the suit, and the judgment was, therefore, void. We think so, because:

(a) The cross action sought a personal judgment against the cross defendant. The cross defendant was a non-resident, and in order for the court to have had jurisdiction over cross defendant personal service upon it must have been had. The cross action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. Farrar v. Steensburg, 173 Cal. 94, 159 Pac. 707. It is well settled in this State that a cross action occupies the atti- [fol. 255] tude of an independent suit and requires service of the cross action upon the cross defendant. Harris v. Schlinke, 95 Tex. 88. This being so, in the absence of a waiver of service, or an appearance by the cross defendant, personal service on the cross defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case. Appellant does not contend otherwise, but insists that it obtained such service under the California statutes regulating service on parties. He pleads the California statutes, as follows:

"Sec. 1015. Service Where Defendant Resides Out of State.

"When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the at-

torney instead of the party, *except service of subpoenas, or writs and other procress issued in the suit,* and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place". (Italics ours.)

"Sec. 442. Cross-Complaint.

"Whenever the defendant seeks affirmative relief against any party, relating to or dependent upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. *The cross-complaint must be served upon the parties affected thereby,* and such parties may demur or answer thereto as to the original complaint. *If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action".* (Italics ours.)

It will be observed that "Section 1015", supra, plainly excepts from its provisions for service of notices and [fol. 256] papers on parties to a suit, "subpoenas, writs and other process issued in the suit". These—*"subpœnas, writs and other process"*—must be served on the respective parties to be affected by the process—there must be personal service of all such. That citations to bring parties into court to litigate their respective rights, are "writs" and "process" issued by the court will hardly be questioned. They are universally recognized as such by all jurisdictions. So, under this law, California requires personal service of such. There being no service of citation served upon Beaumont Export & Import Company to appear and answer appellant's cross action wherein it sought affirmative relief against said company in the form of a personal judgment

for debt, and said company not having appeared or answered before the rendition of the default judgment against it made the basis for recovery herein, the court was without jurisdiction to hear and determine the matter, and without jurisdiction to render the judgment, and so said judgment is without virtue and was void.

(b) Also, we think "Section 442", supra, relating to service in cross actions, relied upon by appellant fails to support his contention that "personal service" was had upon Beaumont Export & Import Company notifying it to answer his cross-complaint, and therefore the court had jurisdiction of the matter, and the default judgment was authorized and is enforceable. An inspection of said law discloses that it provides that "the cross-complaint must be served upon the parties affected", that "if any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action". What does the language "if any of the parties affected by the cross-complaint have not appeared in the action" mean? To what [fol. 257] action does it refer? We take it that it can have but one reference, and that is to the cross action—the action asserted by the defendant against the plaintiff in such suit. It would be rather unusual to contend that a plaintiff can become a cross-complainant against the defendant that he has sued directly. Cross suits are brought by defendants against the plaintiffs suing them, and because the plaintiff has appeared and submitted himself to the jurisdiction of the court for the purpose of his suit, it could not be reasonably contended that he has appeared in all kinds of other claims that may be asserted against him by cross actions therein. The statute certainly refers to and means the action asserted in the cross-complaint, and that if any party to be affected by the cross action does not appear voluntarily in such suit, then a summons must be issued and served upon him "in the same manner as upon the commencement of an original action." It is without dispute that no service was had personally on appellee, nor that it voluntarily appeared before the default judgment was rendered. The recitation of the judgment shows it was by default. The contention is whether the notice of the filing of the cross claim by appellant left at the office of Richard Bailey, a member of the law firm that represented the com-

pany in filing its suit against Montes some three years before, was valid service—personal service as required by both the laws set out supra. We think that both statutes, under the facts shown, required service of citation, or writ, be made upon the cross defendant personally, not substituted service as is shown. Appellant's petition on its face showing an invalid judgment sought to be made the basis for recovery, the court did not err in sustaining the general demurrers leveled at it, nor in dismissing the suit.

But, if we are in error in construing the California statutes above discussed, and it should be said that they do [fol. 258] authorize service upon non-residents in proceedings such as here by service on the lawyer or person representing the non-resident—that is by substituted service, then such statute is without force because as said in Black on Judgments, (2nd Ed.), Sec. 904, p. 1343, "No state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance, so as to render a judgment or decree which shall be binding upon him personally. For that purpose, constructive or substituted service is of no avail". The instant suit being one in personam and not in rem, and the judgment being one by default on substituted service on a non-resident defendant must be treated as a nullity in this state which is called upon to enforce it by action. Pennoyer v. Neff, 95 U. S. 725, 24 L. Ed. 565. In the cited case, it is said:

"But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose."

It is well settled that a judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode recognized as sufficient and valid by the laws of the state where the judgment was rendered; and such absence of jurisdiction will defeat an action on such judgment for its enforcement in any other state. Black on Judgments (2nd Ed.), Vol.

2, Sec. 906, p. 1347 (and authorities cited). The principles of the law relating to the acquisition of jurisdiction by courts over non-resident defendants, apply equally to foreign corporations as to natural persons. A corporation is a resident of the state which creates it, and if sued in the courts of another state, jurisdiction over it can only be acquired in some mode equivalent of personal service of [fol. 259] process on an individual.

Appellant's petition showing on its face that the judgment declared upon was not a valid enforceable judgment in this State, the court did not err in sustaining the general demurrer urged against it and in dismissing the suit. The judgment of the trial court should be affirmed, and it is so ordered.

Affirmed.

W. B. O'Quinn, Associate Justice.

[Endorsed:] Filed Jan. 28, 1937. R. E. Cowan, Clerk District Court of Jefferson Co., Tex., by F. A. Baxter, Deputy.

[fol. 260] In Court of Civil Appeals of Texas

No. 2988

Estaban Adams

vs.

William Saenger et al.

From the District Court of Jefferson County

Opinion by Associate Justice O'Quinn

Judgment—January 28, 1937

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Estaban Adams, and the sureties on his appeal bond, C. W. Howth, M. G. Adams and Lamar Hart, pay all costs in this behalf expended; and this decision be certified below for observance.

[fol. 261] [File endorsement omitted]

IN COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

[Title omitted]

APPLICATION FOR REHEARING—Filed February 9, 1937

2/17/37—Overruled.

First. The court erred in overruling and in refusing to sustain appellant's First, Second and Fourth Assignments of Error and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth propositions thereunder, and in holding that the service had on the cross action against Beaumont Export & Import Company and its statu- [fols. 262-264] tory trustees after its dissolution was not such personal service as the laws of California required, for that, the decisions by the California courts of last resort had construed the statutes of the state applicable to proper service, in the circumstances, and the service obtained was in compliance with such construction of the statutes by said courts of California, and their construction thereof was binding upon the courts of other states, and this Honorable Court erred in putting a different construction on said statutes, and in holding that the said service did not constitute personal service, for that the said cross-defendants had voluntarily entered and submitted themselves to the jurisdiction of the California court and were at all times present through their duly constituted attorney, R. F. Bailey; and in so holding, this court has failed and refused to give that "full faith and credit to the public acts, records and judicial proceedings" of the state of California required by Article 4, Section 1, of the Constitution of the United States, of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

[fols. 265-273] Second. The court erred in failing and refusing to pass upon, or in overruling by implication, appellant's Fifth, Sixth and Seventh Assignments of Error,

and the Fifteenth, Sixteenth, Seventeenth and Eighteenth propositions thereunder, wherein it was alleged that after the judgment on the cross action had been entered, the statutory trustees of the Beaumont Export & Import Company retained R. F. Bailey as their attorney and authorized him to enter their appearance in said cause pending in said superior court of California, for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that the said trustees, through their said attorney, did duly make their appearance in said court, filed a motion to set aside said judgment, and thereupon joined issue as to all of the facts relating to whether or not the service obtained against them on the cross action was proper and sufficient under the laws of California, and therein litigated all of said fact issues, and the court having found against them on all of said fact issues, and having found that the service had was adequate and having entered judgment to that effect, all of said issues became res judicata and the said statutory trustees are thereby estopped to assert that the said service on them on the cross action was insufficient under the laws of California, and they thereby waived all defects or lack of service; and in so holding, this court has failed and refused to give and has wrongfully denied appellant, that "full faith and credit to the public acts, records and judicial proceedings" of the state of California required by Article 4, Section 1, of the Constitution of the United States, as aforesaid.

[fol. 274] Third. The court erred in determining this appeal exclusively on the issue as to whether or not proper service had been obtained in accordance with the law of California on the appellees in the cross action, and in absolutely ignoring or inadvertently failing duly to consider and determine the issue of res judicata of the jurisdictional facts and the legal effect thereof as an estoppel against appellees to assert lack or inadequacy of service upon them in the cross action, for that this issue is paramount to lack of service and is determinative of the appeal contrary to this Honorable Court's holding, and this is so even on the assumption that said service was wholly inadequate or constituted no service at all under the California law.

Fourth. The court erred to the grave prejudice of appellant in failing or refusing expressly to consider and determine the controlling federal question in this appeal,

to-wit, the waiver, res judicata and estoppel aforesaid on the part of appellees in voluntarily submitting themselves to the jurisdiction of the California court and therein litigating the facts relating to proper service and jurisdiction of that court, and a further refusal by this Honorable Court expressly to determine the said issue and federal [fol. 275] question will wrongfully jeopardize appellant's rights on further appeal and put the burden upon him to show affirmatively that the said issues and resulting federal question were properly raised in the trial court and timely presented in this court, although appellant expressly claimed his rights under the "full faith and credit clause" of the federal constitution in his pleading in the trial court and in his written brief and in oral argument in this court.

[fols. 276-277] Sixth. The express allegations of appellant's petition show as a fact that the laws and decisions of California on the said issues of res judicata, estoppel and waiver are the same as those of Texas; and that by the law of Texas on the said subject matters, the appellees would, under the facts and circumstances explicitly alleged, waive all defects or failure of service and be conclusively estopped by the principle of res judicata to assert or rely on said lack or inadquacy of service.

[fol. 278] In Court of Civil Appeals for the Ninth Supreme District of Texas, at Beaumont

[Title omitted]

Amendment to Original Application for Rehearing—Filed February 9, 1937

Fifth

The court erred in overruling and refusing to sustain appellant's First, Second and Fourth Assignments of Error, and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Propositions thereunder, and in holding that the service had on the cross-action against Beaumont Export & Import Company and its statutory trustees after its dissolution was not such personal service as the law of California requires, for that, appellant's

petition alleged and set out the California statutes and decisions covering said subject matted and the decisions [fols. 279-283] by the California courts of last resort construing said statutes as holding that the service obtained in the instant case was in compliance with the said California laws and decisions, and all of said allegations were statements of facts which must be taken by this Honorable Court as true as against the sustaining of the general demurrer by the trial court; and, therefore, the issue as to the truth or falsity of said allegation is a question not involved in this appeal and could not possibly be determined by this court one way or the other until the court has before it the evidence in support of or against the said allegations of fact.

[fols. 284-285] In Court of Civil Appeals of Texas

Jefferson

No. 5053-2988

Estaban Adams

vs.

William Saenger et al.

Order Overruling Application for Rehearing—February 17, 1937

Appellant's motion for rehearing is overruled.

[fols. 286-302] In Supreme Court of Texas

Estaban Adam, Plaintiff in Error,

vs.

William Saenger et al., Defendants in Error

Application for Writ of Error—Filed March 17, 1937

To the Supreme Court of Texas:

[fols. 303-347] First Assignment of Error

The Court of Civil Appeals erred in overruling, by implication, and in refusing to sustain plaintiff in error's

Fifth Assignment of Error and his Fifteenth supporting proposition, wherein the following contention was raised and presented, to-wit: The petition alleged that after the judgment on the cross action had been entered, the statutory trustees and successors of the Beaumont Export & Import Company retained Richard F. Bailey as their attorney and authorized him to enter their appearance in said cause pending in said Superior Court of California, for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that the said trustees, through their said duly authorized attorney, did make their general appearance in said court, filed motion to set aside said judgment and thereupon joined issue as to all the facts relating to whether or not the service obtained against the Beaumont Export & Import Company on the cross action was proper and sufficient under the laws of California, and therein litigated all of said fact issues, relating to jurisdiction, and the court having found against them on all of said fact issues, and having found that the said service was adequate, and having entered judgment to that effect, all of said issues because res judicata and said statutory trustees are thereby estopped to assert the said service was insufficient under the laws of California and they thereby waived all defects or lack of service; and in so holding the Court of Civil Appeals has failed and refused to give and has wrongfully denied plaintiff in error that "full faith and credit to the public acts, records and judicial proceedings" of the State of California required by Article 4, section 1, of the Constitution of the United States of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

(Based on second ground of motion for rehearing.)

[fols. 348-358] Second Assignment of Error

The Court of Civil Appeals erred in impliedly overruling plaintiff in error's Fifth Assignment of Error and his Sixteenth supporting proposition, for that, it was alleged in the petition that after the judgment was entered on the cross action the defendants in error, through their duly authorized attorney, Richard F. Bailey, filed a motion to set aside the said judgment on the ground that the said

judgment had been entered through "the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross-defendant's counsel" (this being the only ground alleged in the motion), and at about the same time duly filed an answer to the cross action on its merits and denying the allegations thereof, and in the verification of said answer stated under oath that he was duly authorized as attorney of record to file the said answer.

(Based on second ground of motion for rehearing.)

[fols. 359-361] Third Assignment of Error

The Court of Civil Appeals erred in arbitrarily refusing to consider and expressly to adjudicate the issue, duly presented to that court on appeal, that controls the final disposition of the whole case, to-wit, that of res judicata, estoppel and waiver aforesaid against the appellees in voluntarily submitting themselves to the jurisdiction of the California Court and therein litigating the fact issues relating to proper service and jurisdiction of that court, as shown under First Assignment of Error and the propositions thereunder.

(Based on fourth ground of motion for rehearing.)

[fols. 362-372] Fourth Assignment of Error

The Court of Civil Appeals erred in overruling and in refusing to sustain plaintiff in error's First, Second and Fourth Assignments of Error and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Propositions thereunder, all of which said assignments and propositions raised and presented the single contention that the service obtained in California as a basis for the judgment was proper and sufficient, and, therefore, the lower court erred in holding that the service had on the cross action against the Beaumont Export & Import Company and its statutory trustees after its dissolution was not such personal service as the laws of California required, for that, the decisions by the California courts of last resort had construed the statutes of the state applicable to proper service, in the circumstances, and the service obtained was in compliance with such construction of the statutes by said courts in California, and their construction thereof was

binding upon the courts of other states, and the lower court erred in putting a different construction on said statutes and in holding that said service did not constitute personal service, for that, the Beaumont Export & Import Company before dissolution, and its statutory trustees and successors after dissolution, had voluntarily entered and submitted themselves to the jurisdiction of the California Court and were at all times present through their duly authorized attorney, Richard F. Bailey; and in so holding the lower courts have failed and refused to give that "full faith and credit" to the public acts, records and judicial proceedings of the State of California required by Article 4, section 1, of the Constitution of the United States, as aforesaid.

(Based on first ground of motion for rehearing.)

[fol. 373] Fifth Assignment of Error

On every and all of the grounds set forth in the foregoing assignments of error, one to four inclusive, and all proposition thereunder, both the Court of Civil Appeals and the trial court erred in failing and refusing to give full faith and credit as required by Article 4, section 1, of the Constitution of the United States, to the final judgment rendered by the Superior Court of California, the same being a court of general jurisdiction, as alleged and as shown by the record.

[fol. 374] Filed Mar. 13, 1937. W. G. Woodard, Clerk, Ninth Supreme Judicial District, Beaumont, Texas.

Forwarded to Supreme Court of Texas, on March 16, 1937.

[fol. 375] Clerk's Office, Supreme Court of Texas

Endorsement on Application for writ of Error:

Application No. 22622. In the Supreme Court of Texas. Estaban Adam, Plaintiff in Error vs. William Saenger et al., Defendants in Error. Application for writ of error. Original for Supreme Court. Filed March 13, 1937. W. G. Woodard, Clerk, Ninth Supreme Judicial District, Beaumont, Texas. Filed in Supreme Court March 17, 1937. S. A. Philquist, Clerk, By Carl B. Lyda, Deputy. Dismissed W. O. J.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 376] IN SUPREME COURT OF TEXAS

App. No. 22622

ESTABAN ADAM

vs.

WILLIAM SAENGER et al.

From Jefferson County 9th District

ORDER DISMISSING APPLICATION FOR WRIT OF ERROR—March 31, 1937

This day came on to be heard the application of Plaintiff in Error for a writ of error to the Court of Civil Appeals for the Ninth District, and the same having been duly considered, it is ordered that the application be dismissed for want of jurisdiction; that applicant, Estaban Adam and sureties, C. W. Howth, M. G. Adams and Lamar Hart, pay all costs incurred herein.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 377] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed April 14, 1937

To the Supreme Court of Texas:

[fols. 378-382] First Assigned Error

This Honorable Court erred in dismissing said application for want of jurisdiction, because the real issue therein presented to this court was whether or not plaintiff in error's first amended original petition stated a cause of action as against the general demurrer sustained by the trial court, and which said action was affirmed by the Court of Civil Appeals.

[fol. 383] Second Assigned Error

The Supreme Court in dismissing the application for the writ for alleged want of jurisdiction, and both of the lower courts, as to all of the errors as shown and set forth in the application to this court for writ of error to the Court

of Civil Appeals, have erroneously failed and refused [fol. 384] to give the said California judgment that full faith and credit required by Article 1, Section 4, of the Constitution of the United States of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

[fol. 385] [File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fols. 386-388] IN SUPREME COURT OF TEXAS

Motion No. 12913

ESTABAN ADAM

vs.

WILLIAM SAENGER et al.

From Jefferson County, 9th District

ORDER OVERRULING MOTION FOR REHEARING—April 28, 1937

The motion for rehearing herein by the plaintiff in error, having been heretofore presented to the Court, and after due consideration of same, it is ordered that the said motion be and it is hereby overruled.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 389] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 390] SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED

To Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States:

It is hereby stipulated and agreed by and between counsel of record for all parties in the above entitled and numbered cause that only the following parts of the record as filed in this case need be printed by the clerk, or under his super-

vision, for the purposes both of the Petition for Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, and for the hearing of said cause in the Supreme Court if the writ is granted, to-wit:

Title of Paper	Record Page
1. Caption	
2. The following contents of what is designated in the said Court of Civil Appeals as the "Transcript" to-wit:	
[fol. 391] References are to pages of instruments named.	
(a) Plaintiff's first amended original petition	12–72
(b) Original answer of William Saenger, et al.	73–77
(c) Original answer of John F. Pipkin, et al.	78
(d) Original answer of defendant, C. A. Lord	79
(e) Plaintiff's reply to demurrers and answers of William Saenger, et al.	80–81
(f) Order sustaining general demurrer and dismissing cause, date thereof and endorsements	82–83
(g) Appeal bond (only that part usually printed by the Clerk of the Supreme Court of the United States), approval by the clerk of the district court and endorsements	84–85
2. The opinion by the Court of Civil Appeals, date of the filing and endorsements	1–8
3. Endorsements on Application for rehearing filed by appellant, showing date upon which it was filed, endorsements, etc. but application not to be printed except as hereinafter stated	1
4. Endorsements on Amendment to the original application for rehearing and date of filing endorsements, etc. but amendment not to be printed except as hereinafter stated	1
5. Order and judgment of the Court of Civil Appeals overruling the application for rehearing, showing date upon which it was overruled, endorsements, etc.	7

Title of Paper	Record Page
6. The date upon which appellant filed with the clerk of the Court of Civil Appeals his application to the Supreme Court of Texas for writ of error, showing also the date upon which it was transmitted, in due course, to the Clerk of the Supreme Court	89–90
7: The dates of the filing of the application to the Supreme Court of Texas for writ of error:	
(a) Date of filing with Clerk of the Court of Civil Appeals	89
(b) Date of filing with Clerk of the Supreme Court	90
[fol. 392]	
8. Order and judgment of the Supreme Court of Texas dismissing the application for writ of error for want of jurisdiction, the date thereof, endorsements, etc.	91
9. Date of filing with the clerk of the Supreme Court of Texas the motion for rehearing on the application for writ of error and endorsements thereon	9
10. Order and judgment of the Supreme Court overruling the motion for rehearing, together with the date of filing and all endorsements thereon	10
11. Appellant's assignments of error, consisting of First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Assignments of Error, as contained in appellant's brief filed in said Court of Civil Appeals, and shown on pages 9 to 17, inclusive, thereof (that is, only verbatim copies of the assignments themselves shall be printed and no other parts of the brief)	9–17
12. Only the grounds or reasons themselves in Ct. Civ. App. urged by appellant for rehearing, as shown in his "Application for Rehearing" shall be printed (that is, no other parts of the application for rehearing shall be printed); the said grounds to be printed verbatim being as follows:	
(a) First	1
(b) Second	5
(c) Third	14

Title of Paper	Record Page
(d) Fourth	14
(e) Sixth	16
(f) Fifth, as shown in the amendment to the original application for rehearing	1

13. With respect to the contents of the application to the Supreme Court of Texas for writ of error, only verbatim copies of the assignments shall be printed (but the propositions, statements, authorities, arguments, etc., under each assignment shall not be printed); the assignments to be printed are as follows:

[fol. 393]

(a) First Assignment of Error	18
(b) Second Assignment of Error	63
(c) Third Assignment of Error	74
(d) Fourth Assignment of Error	77
(e) Fifth Assignment of Error	88

14. With respect to the contents of the motion for rehearing on application to the Supreme Court of Texas for writ of error only verbatim copies of the assignments shall be printed (but the propositions, statements, authorities, arguments, etc., under each assignment shall not be printed); the assignments to be printed are as follows:

(a) First Assigned Error	2
(b) Second Assigned Error	7

15. Certificate by Clerk of the Court of Civil Appeals of Texas

16. Stipulation designating parts of the record to be printed

Dated at Beaumont, Texas, this 8th day of May, 1937.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Estaban Adams, Petitioner. Geo. E. Holland, Attorney for William Saenger, et al., Respondents.

[fol. 394] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, 9th Supreme Judicial District is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

(2416)